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No. 15964 VOL. 3085

United States
Court of Appeals
for the Ninth Circuit

DAN O. HOYE, as Controller of the City of Los Angeles and DAN O. HOYE,

Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif. — 7-25-58

No. 15964

United States
Court of Appeals
for the Ninth Circuit

DAN O. HOYE, as Controller of the City of Los Angeles and DAN O. HOYE,

Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ROGER ARNEBERGH,
City Attorney;

BOURKE JONES,
Assistant City Attorney;

ALFRED E. ROGERS,
Assistant City Attorney;

T. PAUL MOODY,
Deputy City Attorney,
400 City Hall,
Los Angeles 12, California.

For Appellee:

CHARLES K. RICE,
Assistant U. S. Attorney General,
Tax Division, Dept. of Justice,
Washington 25, D. C.;

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States Attorney,
808 Federal Building,
Los Angeles 12, California. [1]

In the District Court of the United States for the Southern District of California, Central Division.

No. 1065—57T

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN. O. HOYE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of Internal Revenue, and RICHARD A. WESTBERG,

Defendants.

COMPLAINT TO QUASH A "NOTICE OF LEVY" AND "FINAL DEMAND" SERVED ON A MUNICIPAL CORPORATION BY THE DIRECTOR OF INTERNAL REVENUE

Come now the plaintiffs and for cause of action allege:

I.

That Dan O. Hoye, the plaintiff herein, is the duly elected, qualified and acting Controller of the City of Los Angeles, California.

II.

That Robert A. Riddell is the duly appointed, qualified and acting Director of Internal Revenue in and for the Sixth District, California.

III.

That on or about the 19th day of March, 1957, the defendant, [2*] Robert A. Riddell, acting for and on behalf of the United States of America, and acting in his capacity of Director of Internal Revenue, Sixth District, California, did cause to be served upon the plaintiff herein a document entitled "Notice of Levy," a copy of which is attached hereto as Exhibit "A" and hereby made a part hereof by reference as though fully set forth herein, which said document claimed the sum of $155.93 to be due and owing to the defendants herein, the United States of America and Robert A. Riddell, Director of Internal Revenue, from the defendant, Richard A. Westberg.

IV.

That on said March 19, 1957, the City of Los Angeles was indebted to Richard A. Westberg in the sum of $158.78; that said sum was then payable to said Richard A. Westberg; that the plaintiff, Dan O. Hoye, as Controller of the City of Los Angeles, did thereupon hold said money because of the claim of the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue.

V.

That on or about the 25th day of June, 1957, the defendant Robert A. Riddell, Director of Internal Revenue, Sixth District, California, acting for and on behalf of the defendant the United States of

*Page numbering appearing at foot of page of original Certified Transcript of Record.

America, did serve upon the plaintiff herein a document entitled "Final Demand," a copy of which is attached hereto as Exhibit "B" and hereby made a part hereof by reference as though fully set forth herein; that said "Final Demand" by its terms requires that the plaintiff herein pay over to the defendant, Robert A. Riddell, Director of Internal Revenue, the sum of $155.93; said "Final Demand" further states that it is based upon and pursuant to Section 6332 of the Internal Revenue Code of 1954; that the plaintiff herein has not paid said sum of $155.93 or any other sum to any of the defendants herein; that said payment is not made because the [3] laws of the State of California, to wit, Section 710 of the California Code of Civil Procedure, requires that the plaintiff herein shall pay over monies owed by the City of Los Angeles to any person other than the person to whom the money is owing only upon the filing of an authenticated abstract of judgment of a court showing that the person is entitled thereto, together with an affidavit showing the exact amount then due; that the defendants Robert A. Riddell and the United States of America and neither of them have filed with the plaintiff herein any authenticated abstract of judgment or affidavit as required by said Section 710 of the California Code of Civil Procedure; that no judgment has been recovered by the defendant the United States of America or Robert A. Riddell, Director of Internal Revenue, against the defendant Richard A. Westberg.

VI.

Plaintiff does not make any claim to said money in his individual capacity, nor in his capacity as Controller of the City of Los Angeles, except that the plaintiff does claim an interest therein solely for the purpose of paying the money to the proper parties legally entitled thereto, so that he may be discharged from his liability as custodian of the money and his duty as a public official to pay out only to the proper party; that the enforcement of the "Notice of Levy" and "Final Demand" will cause plaintiff to breach his duty as a public official and cause him to be personally liable for any money paid to the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue.

Wherefore, plaintiff prays for an order of this court determining that the plaintiff herein is not bound by the "Notice of Levy" or "Final Demand" served upon him by the Director of Internal Revenue as hereinabove set forth; nor any of his employees or deputies; that the "Notice of Levy" and "Final Demand" be quashed; that the court [4] determine that the plaintiff herein is only bound to pay over to the defendants the United States of America, and Robert A. Riddell, Director of Internal Revenue, monies due other persons upon the filing with the plaintiff by said defendant of an authenticated abstract of judgment of a court of competent jurisdiction, together with an affidavit as provided in and required by the California Code of Civil Procedure, Section 710, and for such other and further order as the court deems just in the premises.

ROGER ARNEBERGH,
City Attorney;

BOURKE JONES,
Assistant City Attorney;

ALFRED E. ROGERS,
Assistant City Attorney;

By /s/ T. PAUL MOODY,
Deputy City Attorney,
Attorneys for Plaintiffs. [5]

EXHIBIT A

FCCF

Form 668-A

U. S. Treasury Department
Internal Revenue Service

Notice of Levy

To: Controller, City of Los Angeles, City Hall, Los Angeles, Calif.

You are hereby notified that there is now due, owing, and unpaid from Richard A. Westberg, 7419 Reseda Blvd., Reseda, Calif., to the United States of America the sum of One Hundred Fifty-Five & 93 cents ($155.93) for Internal Revenue taxes, to wit:

Period and Type of Tax: 1955 Income.
Date of Assessment: 8-15-56.

Account No: OP 8-1500288/56L

Unpaid Balance	$150.63
Statutory Additions	$ 5.30
Total Amount Due	$155.93

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at Van Nuys, Calif., this 8th day of March, 1957.

R. A. RIDDELL,
District Director of Internal Revenue,

By /s/ A. D. ALLEN,
Group Supervisor.

Certificate of Service

I hereby certify that this levy was served by handing a copy of this notice of levy to [Stamped: Received March 19, 1957; Controller, City of Los Angeles], on March 19, 1957 at 2 p.m.

/s/ W. G. LUNDQUIST,
Director of Internal Revenue.

EXHIBIT B

Form 668-C

U. S. Treasury Department
Internal Revenue Service

Final Demand

District: Los Angeles.

Date: June 20, 1957.

To: Controller, City of Los Angeles, City Hall, Los Angeles, Calif.

On March 19, 1957, there was served upon you a levy, by leaving with Controller, City of Los Angeles at Los Angeles, Calif., a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Richard A. Westberg of 7419 Reseda Blvd., Reseda, who was at the time, and still is, indebted to the United States of Amer-

Account No: OP 8-1500288/56L

Unpaid Balance	$150.63
Statutory Additions	$ 5.30
Total Amount Due	$155.93

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at Van Nuys, Calif., this 8th day of March, 1957.

R. A. RIDDELL,
District Director of Internal Revenue,

By /s/ A. D. ALLEN,
Group Supervisor.

Certificate of Service

I hereby certify that this levy was served by handing a copy of this notice of levy to [Stamped: Received March 19, 1957; Controller, City of Los Angeles], on March 19, 1957 at 2 p.m.

/s/ W. G. LUNDQUIST,
Director of Internal Revenue.

EXHIBIT B

Form 668-C

U. S. Treasury Department
Internal Revenue Service

Final Demand

District: Los Angeles.

Date: June 20, 1957.

To: Controller, City of Los Angeles, City Hall, Los Angeles, Calif.

On March 19, 1957, there was served upon you a levy, by leaving with Controller, City of Los Angeles at Los Angeles, Calif., a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Richard A. Westberg of 7419 Reseda Blvd., Reseda, who was at the time, and still is, indebted to the United States of Amer-

ica for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of $155.93. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

Sec. 6332. Surrender of Property Subject to Levy.

(a) Requirement—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (for discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with

costs and interest on such sum at the rate of 6 per cent per annum from the date of such levy.

(c) Person Defined—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $155.93, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

R. A. RIDDELL,
District Director of Internal Revenue,

By /s/ A. D. ALLEN,
Group Supervisor.

Certificate of Service

I hereby certify that this Final Demand was served by handing a copy thereof to: [Stamped:

Received June 25, 1957, Controller, City of Los Angeles].

Date: 6/25/57.

/s/ [Indistinguishable]
Collection Officer.

Duly verified.

[Endorsed]: Filed September 10, 1957. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO INTERVENE AND MOTION TO INTERVENE OF THE UNITED STATES OF AMERICA

To the Plaintiff, Dan O. Hoye, and to Roger Arnebergh, Bourke Jones, Alfred E. Rogers, T. Paul Moody, His Attorneys:

You and Each of You will please take notice that on Monday, November 18, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard, in Courtroom No. 6, before the Honorable Ernest A. Tolin, in the Post Office and Courthouse Building, 312 North Spring Street, Los Angeles 12, California, the United States of America, by and through its attorneys herein mentioned, will move the Court for permission to intervene upon the following grounds:

(1) Your movant is a corporation sovereign and body politic, has not consented to be sued in an action such as here brought by the plaintiff against the United States of America and [9] is not subject to the jurisdiction of this Court as a defendant therein.

(2) The intervention herein applied for is directed by the Attorney General of the United States and authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States.

(3) The United States of America has an interest in the matter being litigated in this suit and is a necessary and proper party to a complete determination thereof.

(4) The facts with respect to your movant's interest in this cause are set forth in its proposed complaint in intervention herein, which movant asks leave to file, and which is submitted herewith and by reference made a part hereof.

(5) No previous application for the relief herein asked has been made to any Court or Judge.

Wherefore, your movant prays that an order be made granting the United States of America leave to intervene in this action as against the plaintiff, and to file and serve its said complaint in intervention herein, and directing that service of said complaint in intervention on the plaintiff may be made by mailing a copy of said complaint and summons thereon to his attorneys.

Dated: November 8, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Asst. United States Attorney;

/s/ ROBERT H. WYSHAK,
Attorneys for United States of America. [10]

United States District Court for the Southern District of California, Central Division

No. 1065—57T Civil

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN O. HOYE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of Internal Revenue, and RICHARD A. WESTBERG,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff in Intervention,

vs.

DAN. O. HOYE,

Defendant in Intervention.

COMPLAINT IN INTERVENTION FOR PENALTY UNDER SECTION 6332(b) OF THE 1954 INTERNAL REVENUE CODE

Comes Now the United States of America, after leave of Court having been obtained, and files this, its complaint in intervention herein, and alleges:

I.

The United States of America is a sovereign and a corporate body politic.

II.

Jurisdiction of this Court lies under 28 U.S.C. §1340, [11] §1345 and 26 U.S.C. §7401, §6332.

III.

This action in intervention is directed by the Attorney General of the United States and is authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States.

IV.

The defendant in intervention Dan O. Hoye is the duly elected, qualified and acting Controller of the City of Los Angeles, California.

V.

On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed federal income taxes for the calendar year 1955, and penalties and interest thereon in the aggregate amount of $150.63 against the defendant and taxpayer Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon said taxpayer; but notwithstanding notice and demand, no part of said tax, penalties and interest has been paid and

the whole remains assessed, outstanding and unpaid.

VI.

On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon the defendant in intervention a Notice of Levy upon all property or rights to property belonging to the aforesaid taxpayer. Said Notice of Levy demanded surrender by the defendant in intervention of all property, rights to property, monies, credits, and bank deposits in his possession and belonging to this taxpayer and all sums or other obligations owing from him to this taxpayer. Said Notice of Levy made demand upon the defendant in intervention for the sum of $155.93 from the amount then owing from said defendant in [12] intervention to the taxpayer Richard A. Westberg.

VII.

Plaintiff in intervention is informed and believes and based on such information and belief alleges that at the time of the service of said Notice of Levy upon the said defendant in intervention, said defendant in intervention owed the taxpayer Richard A. Westberg the sum of $158.78.

VIII.

On June 25, 1957, a delegate of the Secretary of the Treasury of the United States duly served upon the defendant in intervention a Final Demand for the amount set forth in the Notice of Levy, $155.93.

IX.

Plaintiff is informed and believes and based on such information and belief alleges that at the time of the service of said Final Demand upon the said defendant in intervention, said defendant in intervention owed the taxpayer Richard A. Westberg the sum of $158.78.

X.

The defendant in intervention at the time of the service of said Notice of Levy and at the time of the service of said Final Demand as hereinabove set forth, refused and at all times herein mentioned, has refused and now refuses to pay over or surrender the property, rights to property, monies, credits, and sums of money or other obligations owing from him to the taxpayer, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him.

Wherefore, plaintiff in intervention prays for judgment against the defendant in intervention in his own person and estate for the sum of $155.93, together with costs and interest on such sum at the rate of six per centum per annum from the date of levy, and for the plaintiff in intervention's costs to be taxed by the [13] Clerk of this Court and for such other and further relief as the Court may deem meet and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Asst. United States Attorney;

/s/ ROBERT H. WYSHAK,
Attorneys for United States of America, Plaintiff in Intervention.

Affidavit of service by mail attached.

[Endorsed]: Filed November 8, 1957. [14]

[Title of District Court and Cause.]

NOTICE OF MOTIONS TO DISMISS AND MOTIONS TO DISMISS AND SUPPORTING MEMORANDUM

To the Plaintiff, Dan O. Hoye, and to Roger Arnebergh, Bourke Jones, Alfred E. Rogers, T. Paul Moody, His Attorneys:

You and Each of You will please take notice that on Monday, November 18, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard, in Courtroom No. 6, before the Honorable Ernest A. Tolin, in the Post Office and Courthouse Building, 312 North Spring Street, Los Angeles 12, California, the defendants, United States of America and Robert A. Riddell, by and through their attorneys herein mentioned, will make the following motions to dismiss the above action:

(1) The defendant United States of America moves the Court to dismiss the action for lack of jurisdiction over the United States, because the United States has not consented to be sued in an action [16] of this nature.

(2) The defendant Robert A. Riddell moves the Court to dismiss the action as to the defendant Robert A. Riddell inasmuch as he is not a proper party defendant, since the tax lien in question is not owned by him but rather by the United States of America.

(3 The defendants, United States of America and Robert A. Riddell, move the Court to dismiss the action for lack of jurisdiction over the subject matter since the cause of action is one in the nature of injunctive relief and specifically prohibited by §7421 of Title 26 U.S.C., the Internal Revenue Code of 1954.

(4) The defendants, United States of America and Robert A. Riddell, move the Court to dismiss the action for lack of jurisdiction over the subject matter since the cause of action is in the nature of an action for declaratory relief and specifically within the prohibition of §2201, Title 28 U.S.C.

Dated: November 8, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Asst. United States Attorney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendants United States of America and Robert A. Riddell.

Affidavit of service by mail attached.

[Endorsed]: Filed November 8, 1957. [17]

[Title of District Court and Cause.]

ORDER PERMITTING INTERVENTION BY THE UNITED STATES OF AMERICA

The motion of the United States of America for permission to intervene herein having come on for hearing and leave having been asked to file a complaint in intervention herein, and good cause appearing therefor:

It Is Hereby Ordered that leave be granted to file said complaint in intervention; that said United States of America be permitted to intervene in the action against the plaintiff; and that service of said complaint in intervention on the plaintiff may [29] be made by mailing a copy of said complaint and summons thereon to his attorneys.

Dated: This 6th day of February, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to Form this 18 day of November, 1957.

ROGER ARNEBERGH,
BOURKE JONES,
ALFRED E. ROGERS,
T. PAUL MOODY,

/s/ T. PAUL MOODY,
Attorneys for Plaintiff.

[Endorsed]: Filed February 6, 1958. [30]

[Title of District Court and Cause.]

MINUTES OF THE COURT
FEBRUARY 6, 1958

Present: Hon. Ernest A. Tolin, District Judge;
Counsel for Plaintiffs: No Appearance.
Counsel for Defendant: No Appearance.

Proceedings:

Court grants defendant's motion to dismiss heretofore taken under submission.

Court grants defendant's motion to intervene and signs order at this time.

Counsel for defendant to prepare formal order granting defendant's motion to dismiss.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

By /s/ WAYNE E. PAYNE,
Deputy Clerk. [31]

[Title of District Court and Cause.]

AMENDED COMPLAINT IN INTERVENTION FOR PENALTY AND FOR FORECLOSURE OF INTERNAL REVENUE TAX LIEN AGAINST PERSONAL PROPERTY

Comes Now the United States of America and files this, its amended complaint in intervention, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure, and for its first cause of action against Dan O. Hoye, defendant in intervention, alleges as follows:

First Cause of Action

1. The United States of America is a sovereign and a [37] corporate body politic.

2. Jurisdiction of this Court lies under 28 U.S.C. §§1340, 1345, and 26 U.S.C. §§7401, 7403, 6332.

3. This action in intervention is directed by the Attorney General of the United States and is authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States.

4. The defendant in intervention Dan O. Hoye is the duly elected, qualified and acting Controller of the City of Los Angeles, California.

5. On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed federal income taxes for the calendar year 1955, and penalties and interest thereon in the aggregate amount of $150.63 against the taxpayer

Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon said taxpayer; but notwithstanding notice and demand, no part of said tax, penalties and interest has been paid and the whole remains assessed, outstanding and unpaid. Interest accrues on said tax liability at the daily rate of $.02 until paid.

6. On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon the defendant in intervention a Notice of Levy upon all property or rights to property belonging to the aforesaid taxpayer. Said Notice of Levy demanded surrender by the defendant in intervention of all property, rights to property, monies, credits, and bank deposits in his possession and belonging to this taxpayer and all sums or other obligations owing from him to this taxpayer. Said Notice of Levy made demand upon the defendant in intervention for the sum of $155.93 from the amount then owing from said defendant in intervention to the taxpayer Richard A. Westberg. [38]

7. Plaintiff in intervention is informed and believes and based on such information and belief alleges that at the time of the service of said Notice of Levy upon the said defendant in intervention, said defendant in intervention owed the taxpayer Richard A. Westberg the sum of $158.78.

8. On June 25, 1957, a delegate of the Secretary of the Treasury of the United States duly served upon the defendant in intervention a Final Demand for the amount set forth in the Notice of Levy, $155.93.

9. Plaintiff in intervention is informed and believes and based on such information and belief alleges that at the time of the service of said Final Demand upon the said defendant in intervention, said defendant in intervention owed the taxpayer Richard A. Westberg the sum of $158.78.

10. The defendant in intervention at the time of the service of said Notice of Levy and at the time of the service of said Final Demand as hereinabove set forth, refused and at all times herein mentioned, has refused and now refuses to pay over or surrender the property, rights to property, monies, credits, and sums of money or other obligations owing from him to the taxpayer, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him.

Second Cause of Action

For a Second Cause of Action Against the Defendants in Intervention Dan O. Hoye, City of Los Angeles and Richard A. Westberg, Plaintiff in Intervention Alleges as Follows:

11. Plaintiff in intervention repeats and realleges paragraphs 1 through 5 of the First Cause of Action of this amended complaint in intervention,

and incorporates them herein as if fully set forth. [39]

12. The defendant in intervention City of Los Angeles is a municipal corporation in and of the State of California.

13. Plaintiff in intervention is informed and believes and based on such information and belief alleges that at the time of said assessment, the defendant in intervention City of Los Angeles owed the taxpayer and defendant in intervention, Richard A. Westberg, the sum of $158.78 as wages for services which had been rendered to the City of Los Angeles.

14. Under the internal revenue laws, the tax liability of the defendant in intervention Richard A. Westberg, set out hereinabove in paragraph 5, became a lien upon all property and rights to property of said defendant in intervention, including said debt of $158.78, on the date of said assessment.

Wherefore, plaintiff in intervention prays for judgment as follows:

1. Against the defendant in intervention Dan O. Hoye in his own person and estate for the sum of $155.93, together with costs and interest on such sum at the rate of 6 per centum per annum from the date of levy; and

2. For foreclosure of its tax lien against the debt owed the taxpayer and defendant in interven-

tion, Richard A. Westberg, in the sum of $158.78; and

3. For its costs to be taxed by the Clerk of this Court; and

4. For such other and further relief as the Court may deem meet and proper in the premises.

LAUGHLIN E. WATERS,
U. S. Attorney;

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Asst. U. S. Attorney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant and Plaintiff in Intervention, United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed February 24, 1958. [40]

United States District Court for the Southern District for California, Central Division

No. 1065-57 T

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN O. HOYE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of Internal Revenue, and RICHARD A. WESTBERG,

Defendants.

ORDER GRANTING MOTION TO DISMISS

Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above-entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this is not a final order under Fed. R. Civ. P. 54(b), since the United States of America has filed its complaint in intervention.

Dated: March 10, 1958.

/s/ ERNEST A. TOLIN,
United States District Judge.

Lodged February 26, 1958.

[Endorsed]: Filed and entered March 10, 1958.

[Title of District Court and Cause.]

NOTICE OF ORDER

Roger Arnebergh, Esq.,
400 City Hall,
Los Angeles 12, Calif.;

Robert H. Wyshak, Esq.,
808 Federal Bldg.,
Los Angeles 12, Calif.

Re: Hoye, etc. v. U. S. A., et al., No. 1065-57-T.

You are hereby notified that order granting motion to dismiss in the above-entitled case has been entered this day in the docket.

Dated: March 10, 1958.

CLERK, U. S. DISTRICT COURT,

By C. A. SIMMONS,
Deputy Clerk. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, and Robert A. Riddell, Director of Internal Revenue, Defendants, and to Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief Tax Division, and Rob-

ert H. Wyshak, Assistant United States Attorney, Their Attorneys:

You and Each of You Will Please Take Notice, that the Plaintiff Dan O. Hoye, as Controller of the City of Los Angeles, and Dan O. Hoye, Plaintiffs above named, do hereby give notice of and do hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Order Granting Motion to Dismiss entered in the above-entitled action on March 10, 1958. [45]

Dated: 14th day of March, 1958.

ROGER ARNEBERGH,
City Attorney;

BOURKE JONES,
Assistant City Attorney;

ALFRED E. ROGERS,
Assistant City Attorney;

By /s/ T. PAUL MOODY,
Deputy City Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed March 17, 1958. [46]

[Title of District Court and Cause.]

STIPULATION FOR COSTS ON APPEAL

Know All Men by These Presents, That Fidelity and Deposit Company of Maryland, a Corporation

organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America, Robert A. Riddell, Director of Internal Revenue, and Richard A. Westberg in the penal sum of Two Hundred and Fifty and No/100 ($250.00) Dollars, to be paid to said Defendants, his successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, that whereas, Dan O. Hoye, as Controller of the city of Los Angeles, and Dan O. Hoye is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from an order dated March 10, 1958, granting a motion to dismiss the Plaintiff's complaint by the United States District Court for the Southern District of California, Central Division, in the above-entitled case.

Now, Therefore, if the above-named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against him if he fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them

of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed, and dated this 17th day of March, 1958.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ ROBERT HECHT,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ T. PAUL MOODY,
Attorney.

Approved this 17th day of March, 1958.

JOHN A. CHILDRESS,
Clerk, U. S. District Court, Southern District of California.

State of California,
County of Los Angeles—ss.

On this 17th day of March, 1958, before me, R. G. Cicciarelli, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht known to me to be the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the Corporation that executed

the within instrument, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto and his own name as Attorney-in-Fact.

[Seal] /s/ R. G. CICCIARELLI,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 54, inclusive, containing the original:

Complaint.

Notice of Motion to Intervene and Motion to Intervene of the United States of America.

Notice of Motions to Dismiss and Motions to Dismiss and Supporting Memorandum.

Points and Authorities in opposition to motions to dismiss by Defendants the United States of America and Robert A. Riddell, Di-

rector of Internal Revenue and Motion to file Complaint in Intervention.

Order permitting intervention by the United States of America.

Minute Order of 2/6/58 re: granting motion to dismiss and granting motion to intervene.

Complaint in Intervention.

Amended Complaint in Intervention.

Order Granting Motion to Dismiss.

(Copy) Notice of order granting Motion to Dismiss.

Notice of Appeal.

(Copy) Bond for Costs on Appeal.

Designation of Contents of Record on Appeal.

Additional Designation of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: Los Angeles, California, this 3rd day of April, 1958.

JOHN A. CHILDRESS,
Clerk,

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15964. United States Court of Appeals for the Ninth Circuit. Dan O. Hoye, as Controller of the City of Los Angeles and Dan O. Hoye, Appellants, vs. United States of America and Robert A. Riddell, Director of Internal Revenue, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 7, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States District Court for the Southern District of California, Central District

No. 1065-57 T

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN O. HOYE,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

STATEMENT OF POINTS ON APPEAL

[F.R.C.P. Rule 75 (d)]

Upon Appeal from the United States District Court, Southern District of California, Central Division.

Plaintiffs-Appellants herein present the points upon which they claim the District Court erred:

(1) The court erred in dismissing the Complaint of Plaintiffs-Appellants on the alleged grounds of lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants.

ROGER ARNEBERGH,
City Attorney;
BOURKE JONES,
Assistant City Attorney;
ALFRED E. ROGERS,
Assistant City Attorney,

By /s/ T. PAUL MOODY,
Deputy City Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed April 17, 1958.

No. 15964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles and DAN O. HOYE,

Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

BRIEF OF APPELLANT.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
ALFRED E. ROGERS,
Assistant City Attorney,
T. PAUL MOODY,
Deputy City Attorney,
RALPH J. EUBANK,
Deputy City Attorney,
400 City Hall,
Los Angels 12, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 15964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles and DAN O. HOYE,

Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

BRIEF OF APPELLANT.

Statement of the Pleadings and Facts.

The appellant and plaintiff below, Dan O. Hoye, is the Controller of the City of Los Angeles. [Tr. p. 3.] In such capacity, *inter alia,* he is charged by the laws of the State of California with disbursing the wages of employees of the City in a prescribed manner. [Tr. pp. 5-6.] (The applicable California laws are set forth in the Appendix hereto.)

On March 19, 1957, the City of Los Angeles was indebted to Richard A. Westberg, an employee of that city, in the sum of $158.78 for wages then due and owing but unpaid. [Tr. p. 4.]

On the same date appellee and defendant below, Robert A. Riddell, who is the Director of Internal Revenue for

the Sixth District, California, served upon Hoye a "Notice of Levy" pursuant to Section 6321 of the Internal Revenue Code of 1954. [Tr. pp. 4 and 8.] The said levy claimed the sum of $155.93 to be then due, owing and unpaid from Westberg to the United States for Internal Revenue taxes for the year 1955. [Tr. p. 7.]

On June 25, 1957, the District Director further served upon Hoye a "Final Demand" requiring the payment of the aforesaid amount and giving notice that failure to comply would result in enforcement proceedings being initiated pursuant to Section 6332 of the Internal Revenue Code. [Tr. pp. 9-11.]

Thereafter, on September 10, 1957, Hoye filed in the United States District Court for the Southern District of California, Central Division, a complaint denominated as a "Complaint to Quash a Notice of Levy and Final Demand Served on a Municipal Corporation by the Director of Internal Revenue" which named as defendants the United States of America, Riddell and Westberg. [Tr. p. 3.] Westberg was never served and did not otherwise appear in the action.

The gist of this pleading was that Hoye claimed no interest in the sum owing to Westberg other than for the purpose of paying the money to the proper parties legally entitled thereto, so that he would be discharged from his liability as custodian of the money and discharged from his duty as a public official to pay out only to the proper party. [Tr. p. 6.] Hoye asked that the District Court quash the notice of levy and final demand and that it determine that he was bound to pay the money over to the Director only in accordance with California law which would exempt him from personal liability. He

further asked for "such other and further order as the court deems just in the premises." [Tr. p. 6.]

On November 12, 1957, the United States filed a "Notice of Motion to Intervene and Motion to Intervene of the United States of America" [Tr. p. 12], a "Complaint in Intervention for Penalty Under Section 6332(b) of the 1954 Internal Revenue Code" [Tr. p. 14] and a "Notice of Motion to Dismiss and Motion to Dismiss and Supporting Memorandum." [Tr. p. 18.]

Following a hearing on these separate motions, the District Court on February 6, 1958, signed an order permitting intervention by the United States [Tr. p. 20], and entered in the minutes an order granting defendants motion to dismiss and directing defendants to prepare a formal order thereon. [Tr. p. 21.]

Thereafter, the government filed an amended complaint in intervention for penalty and for foreclosure for internal revenue tax lien against personal property. [Tr. p. 22.]

On March 10, 1958, the District Court then signed a formal order granting the government's motion to dismiss which provided as follows:

> "Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above-entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this is not a final order under Fed. R. Civ. P. 54(b), since the United States of America has filed its Complaint in Intervention." [Tr. p. 27.]

On the same date notice of the granting of the motion to dismiss was given and on March 14, 1958, Hoye filed a notice of appeal from the order granting the motion to dismiss. [Tr. p. 28.]

Basis of Jurisdiction of the United States District Court.

The United States District Court for the district wherein funds are situated and levied upon pursuant to Section 6321 of the Internal Revenue Code has jurisdiction in disputes similar to, if not identical to that alleged in Hoye's complaint by virtue of the following statutes:

(1) 28 U. S. C. A., Section 2463, which provides:

> "All property taken or detained under any revenue law of the United States shall not be reprievable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Property against which a warrant of distraint has been issued for a husband's income taxes, is "property taken or detained" within the meaning of this statute *Rothensies v. Ullman,* 110 F. 2d 590, and in addition to that case, as discussed hereafter, jurisdiction has been assumed in the following comparable cases: *Raffaele v. Granger,* 196 F. 2d 620; *Seattle Ass'n of Credit Men v. United States,* 240 F. 2d 906; *Lavino v. Jamison,* 230 F. 2d 909; *Gerth v. United States,* 132 Fed. Supp. 894; *Brinker Supply Co. v. Dougherty,* 134 Fed. Supp. 384.

(2) 28 U. S. C. A., Section 2201, which provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading may declare the rights and

other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The theory of the application of this jurisdictional statute, as hereafter discussed, is that where, as here, a party other than the taxpayer is the person concerned in the controversy, the case is not one "with respect to Federal taxes."

Basis of Jurisdiction of the United States Court of Appeals.

The basis for the jurisdiction of this Court is found in 28 U. S. C. A., Section 1291, which provides:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The order which is claimed to be the final decision of the district court herein provides, in part, that the complaint

> ". . . may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; . . ." [Tr. p. 27.]

Statement of the Case.

This case presents a situation instituted by a District Director of Internal Revenue wherein a municipal officer charged with the disbursement of public funds of the municipality is faced with a series of alternatives each of which may be conclusive against him whichever he chooses. Specifically, the two dilemmas presented involve a municipal controller in a community property state having under his control unpaid wages of a married municipal employee which wages have been subjected to distraint proceedings by a District Director of Internal Revenue for unpaid income taxes owed by the employee to the United States.

Each of the dilemmas faced by the controller is based upon his inability to absolve himself from personal liability by acceding to the District Director's demand that the employee's wages be paid over.

The first dilemma arises from the fact that the controller of the City of Los Angeles may disburse wages owing to a city employee only to such employee in accordance with the provisions of the Charter of the city or in accordance with Section 710 of the California Code of Civil Procedure which permits the garnishment of such wages by the usual judicial proceedings characterizing such action. (See Appendix.) To deal with such wages in any other manner subjects the controller to personal liability for the amounts involved as well as possible criimnal liability for malfeasance in office. The federal statutes relating to distraint proceedings by the Director of Internal Revenue for unpaid taxes do not provide that the person levied upon is to be exempt from personal liability upon turning over the property levied

upon, although the government contends that the legal effect of such action would be to exonerate the holder. However, the controller here, does not choose to gamble upon the correctness of some third person's view of the law.

A second and equally compelling dilemma faced by the municipal controller arises from the fact that under the community property laws of the State of California he has no absolute assurance that a married municipal employee necessarily has any property interest in wages due and owing to such employee. While it is generally true in California that the wages of a husband are community funds and that such funds would be liable for a debt such as unpaid income taxes of the husband or of the community, it is well established law in California that community property may be transmuted to other forms of property by either a written or oral agreement between the spouses. Consequently, a pre-existing agreement between such employee and his wife to the effect that all or a portion of his wages were to constitute the wife's separate property would effectively vest in the wife exclusive ownership as to such funds which would not then be subject to the payment of either the husband's or the community's debt to the United States for federal income taxes.

In view of these perplexing alternatives, the controller here in his complaint, in effect, asked the district court to determine who was the proper party to whom payment should be made so as to exonerate himself from all personal liability. The district court instead of entertaining his action dismissed it, and permitted the government to proceed in a punitory action against the controller

both in his official and individual capacities for failure to turn over such funds to the Director.

The question presented for determination may be stated as follows:

Where a director of internal revenue issues a warrant of distraint pursuant to Section 6321 of the Internal Revenue Code against wages due and owing to a married municipal employee which wages are in the custody of the controller of such municipality, does the federal district court have jurisdiction upon application of the controller to determine (1) the proper party to whom such funds should be paid so as to absolve the controller from liability for such payment, and (2) the nature and extent of the employee's interest in such wages where the property laws of the State are such that such wages may in whole or in part be the property of the employee's spouse?

Specification of Errors.

The appellant Hoye contends that the District Court erred: (1) in dismissing his complaint on the purported grounds of lack of jurisdiction over the subject matter and for lack of jurisdiction over the persons of the defendants; and

(2) in characterizing its order of dismissal as not being a final order because the United States had filed its complaint in intervention.

ARGUMENT.

POINT I.

The Order Granting the Motion of the United States to Dismiss the Complaint Is a Final and Appealable Order.

The District Court stated on the face of its order to dismiss that ". . . this is not a final order under Fed. Rules Civ. Proc. 54(b), since the United States of America has filed its Complaint in Intervention, . . ." This statement, however, does not fix the character of the order or establish its legal effect. As held in *Audi-Vision Inc. v. RCA Mfg. Co.,* 136 F. 2d 621, 623, and similar cases, the question whether a decree or order is final and appealable is not determined by the name by which the lower court gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree. Such consideration here compels the conclusion that the order appealed from is final. The wording of the order is clear and unambiguous. It emphatically and definitely states that Hoye's complaint was, and is thereby, completely and absolutely dismissed. The essential issue raised in that action, *i. e.,* a determination as to the proper party to whom payment of the funds levied upon should be made, is not presented by the government's suit in intervention. Hence, the realities of the situation effectively overcome the District Court's claim that the order is not final.

The applicable rule is well stated in the case of *Thompson v. Murphy,* 93 F. 2d 38, where it is said:

> "An order, judgment, or decree, which leaves the rights of the parties to the suit affected by it undeterminable—one which does not substantially and completely determine the rights of the parties affected

by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit appealable. (Cases cited) But a final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be jointly liable with those against whom the suit is retained, and a final decision which completely determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review in this court by appeal or writ of error."

The foregoing rule has been adhered to in the following cases:

Rust v. United Water Works, 70 Fed. 129, 132; *Bankers Trust Co. v. T. K. Railway,* 251 Fed. 789, 797; *Rector v. United States,* 20 F. 2d 845, 860-872; *Curtis v. Connly* (C. C. A. 1), 264 Fed. 650, affirmed, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; *Sheppy v. Stevens* (C. C. A. 2), 200 Fed. 946, 947, 948; *Jackson v. Jackson* (C. C. A. 4), 175 Fed. 710, 715; *Great Lakes Towing Company v. St. Joseph Chicago S.S. Co.* (C. C. A. 7), 253 Fed. 635; *Siegmund v. General Commodities Corp.* (C. C. A. 9, 1949), 175 F. 2d 952; *Bradshaw v. Miner's Bank* (7 Cir.), 81 Fed. 902; *Hooven, Owens and Rentschler Co. v. John Featherstones' Sons* (C. C. A. 8, 1901), 111 Fed. 81; *Heikkinen v. United States,* 208 F. 2d 738, 740, 741; *Swift & Co. v. Compania Colombiana* (1949), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206-1210; *Cohen v. Industrial Loan Corp.,* 337 U. S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528.

The two cases last cited were commented upon in *United States v. Cefaratti,* 202 F. 2d 13, at page 16, as follows:

> "We understand the Cohen and Swift cases to establish this principle. An order that does not 'terminate an action' but is, on the contrary, made in the course of an action, has the finality that Section 1291 requires for appeal if (1) it has 'a final and irreparable effect on the rights of the parties' being 'a final disposition of a claimed right;' (2) it is 'too important to be denied review;' and (3) the claimed right 'is not an ingredient of the cause of action and does not require consideration with it."

The government's action in intervention as to Hoye, which is based solely upon Section 6332(b) of the Internal Revenue Code, presents only the question as to whether Hoye in his own person and estate is to be held liable for the sum levied upon together with costs and interest on such sum at the rate of 6 per centum per annum from the date of levy. Consequently, the order dismissing his action is just as final and conclusive as though no action in intervention had been filed, and therefore is appealable.

POINT II.

The District Court Has Jurisdiction Under the Provisions of 28 U. S. C. A. 2201 to Declare the Rights and Other Legal Relations Sought by the Appellant's Action.

The Declaratory Judgments Act has been held applicable to cases comparable to that presented by Hoye's complaint in at least two previous cases.

The case of *Tomlinson v. Smith* (C. C. A. 7, 1942), 128 F. 2d 808, was an action by Tomlinson against Smith as Collector of Internal Revenue for the District of Indiana to restrain the defendant from issuing or serving a warrant of notice of distraint in connection with the attempted collection of certain taxes, and for a Declaratory Judgment. From an order granting an interlocutory injunction, the defendant appealed. The complaint sought to prevent the Collector of Internal Revenue from issuing or serving any warrant or notice of distraint upon any of the customers of the Plymouth Manufacturing Co., or upon any person, firm or corporation under said company, or the plaintiff in his capacity as trustee in possession of the business property and choses in action of said company. The defendant contended that the proceeding was one to enjoin the collection of federal taxes and therefore prohibited by Section 3653, Title 26, U. S. C. A., Internal Revenue Code, which provides in part that:

> ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The defendant further contended that the court was without jurisdiction to declare the rights of the parties because Title 28, U. S. C. A., Section 400 (now, 28 U. S. C. A., Sec. 2201) excepts therefrom controversies

as to federal taxes and it was upon this basis that the defendant by its Motion to Dismiss attacked the jurisdiction of the court to grant the relief sought.

The facts of said case, briefly stated, indicated that the Plymouth Manufacturing Co., on October 10, 1938, entered into a lease with Walfarth, Warren, Thompson and Tanner, as lessees of certain real and personal property. On October 22, 1938, said lessees entered into a partnership agreement with some 78 other persons, all of whom appear to have been former employees of the corporation. The lessees were designated as constituting the Board of Controls for the partnership and on October 22, 1938, the Plymouth Manufacturing Co., took charge and control of the property described in the lease and proceeded to operate the enterprise. The Plymouth Manufacturing Co., paid to the United States all Social Security, excises and other levies up to January 1, 1939. The partnership borrowed funds from the State Exchange Bank of Culver, Indiana, and to secure such loans in 1939 it executed a chattel mortgage which included accounts receivable from customers of the enterprise. By July 15, 1941, this mortgage was security for obligations in the amount of $65,160.12. On this date a contract was made between the partnership and the mortgagees by which the latter took possession of the business to supervise financial affairs. About March 1940 the Commissioner of Internal Revenue inaugurated a course of investigation to determine the liability of said partnership for social security taxes, and on November 20, 1940, the Commissioner ruled all the partners were employees except Walfarth, Warren, Tanner and Thompson, the lessees, and the Commissioner levied social security taxes aggregating $8000.00, together with penalties and interest

upon said four partners. The complaint alleges plaintiff was designated as trustee by the mortgagees for the purpose of protecting the rights of customers and especially the mortgagees and in such capacity he was authorized to collect from the customers of the enterprise and apply such collection upon the debt owing the mortgagees.

The complaint further alleges that the Collector of Internal Revenue persistently annoyed, harassed, and threatened the business activities of the enterprise and on August 22, 1941, said Collector dispatched to all of the largest debtors a "Final Notice and Demand" requiring each of them to pay to the Collector any moneys owing by them to the partnership. Thereupon the debtors refused to pay their obligations to the plaintiff.

The court held (p. 810) that the defendant concedes there are exceptional and extraordinary circumstances which will remove a case from the inhibition of the statute. Defendant argues that no such circumstances exist in the instant matter. The court doubted validity of such contention and declared it to be more important that plaintiff is not the alleged tax debtor; that he sues in the capacity of a trustee for the purpose of protecting the mortgage lien of property which defendant is seeking to distrain in satisfaction of taxes claimed to be owing by the partnership. (P. 811.)

The court cites the case of *Long v. Rasmussen,* Collector (D. C.), 281 Fed. 236, that a court in construing the revenue provision in question properly makes a distinction between suits instituted by taxpayers and non-taxpayers. The court held the former are within the scope of the inhibition, but the latter non-taxpayers are not. (To the same effect see *Rothensies v. Ullman* (3 Cir.), 110 F. 2d 590, 592.)

The court pointed out that the restraining order did not interfere with the right of the defendant to proceed against the taxpayer, or the one from whom the tax is alleged to be due. The court further held that the language of the statute which excepts federal taxes from the Declaratory Judgments Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collecting of a tax when it applies to a suit by a taxpayer, but not to a suit by a third party seeking to protect a lien claimed to be superior to that of the Tax Collector as in the instant case. The court held that the District Court had jurisdiction to enter a Declaratory Judgment.

The case of *Hoye, Controller v. United States* (S. D. Cal., 1953), 109 Fed. Supp. 685, came before the District Court on a Motion of the United States of America and Robert A. Riddell, as Collector of Internal Revenue, to dismiss the complaint of the plaintiff who as City Controller of the City of Los Angeles is charged with the duty of paying salaries and pensions of the employees of said city. The defendant Champion according to the complaint was entitled to the sum of $185.85, as an employee or pensioner. The collector filed Final Notice and Demand and Levy upon the Controller for the sum of $121.71, as money due the United States from the defendant Champion. The complaint sought declaratory relief under the terms of the Declaratory Judgments Act, 28 U. S. C., Section 2201.

The United States and Riddell contended that the phrase "except with respect to Federal taxes," contained in Section 2201, and the provision in 26 U. S. C., Section 3653(a), which provides so far as material to said action that ". . . no suit for the purpose of restrain-

ing the assessment or any tax shall be maintained in any court . . .", deprives said court of jurisdiction either to give a declaratory judgment or to issue an injunction. The court (p. 686) pointed out that the contentions of the government were considered in the case of *Tomlinson v. Smith,* hereinabove cited, and the court therein distinguished between suits instituted by taxpayers and nontaxpayers, and held that the taxpayer was within the scope of the inhibition of the Declaratory Judgments Act. The court then held

> "While in that case the court pointed out that under the allegations of the complaint the third party claimed a prior lien, nevertheless, the situation is analogous to the instant case when the City of Los Angeles merely holds as a trustee the money which is due to the defendant taxpayer, Champion. Furthermore, under the law of the State of California, Sec. 710, Cal. C. C. P., the plaintiff Hoye as City Controller cannot pay money owed by the City of Los Angeles to anyone other than the one to whom the money is due unless and until there is filed with him an authenticated abstract of judgment of a court showing that the person is entitled thereto. If the plaintiff, Hoye, recognized the Demand and Levy by the Collector and paid the sum of $121.71, therein demanded, the plaintiff, Hoye, would still be liable to pay that same amount to Champion under the terms of Section 710, of the California Code of Civil Procedure. Thus the unusual circumstances referred to in Tomlinson v. Smith, supra, exist in this case and the defendant's Motion to Dismiss is denied."

POINT III.

The District Court Also Has Jurisdiction Under the Provisions of 28 U. S. C. A. 2463 to Hear and Determine the Appellant's Action on Its Merits.

Under this section providing that property detained under revenue laws of the United States shall be subject only to orders and decrees of courts of the United States having jurisdiction thereof, it has been repeatedly held that the District Court has jurisdiction to quash a warrant of distraint such as that involved in the instant case, both upon the ground that the holder of the property levied upon would not be exonerated from personal liability upon acceding to the demand, and upon the ground that the property levied upon belonged to a third party and was being taken to satisfy the taxes of another.

In the case of *United States v. Penn. Mut. Life Ins. Co.,* 130 F. 2d 495, at pages 498-499, the court states:

> "The 'property, or rights to property,' contemplated by Sec. 3710 (now Sec. 6332) are only such as where the holder's payment or transfer thereof to the Collector of Internal Revenue will operate to discharge the holder's liability to the owner." (Parenthetical matter supplied.)

Also, in *United States v. Winnett,* 165 F. 2d 149, at 151, the court in considering a distraint proceeding recognizes that the holder "should not be required to pay the same debt twice even though the interposition here is by the sovereign."

It is submitted that the California laws set forth in the Appendix make it clear that the controller here would be

so liable since the federal statutes involved do not provide that he is exonerated from liability upon complying with the District Director's levy and demand.

The matter is well stated in the *Penn Mutual* case (130 F. 2d 495, *supra*) where it is said:

> "How Congress might render definite an insured's pecuniary interest under a life insurance policy so that the insurer's discharge from its contractual liability would follow from its paying the insured's accrued interest in the policy to the Collector of Internal Revenue on account of a tax delinquency of the insured is neither for us to discuss nor consider. It is sufficient for present purposes that Congress did not act to that end in Sec. 3710 (now Sec. 6332) of the Internal Revenue Code." (Parenthetical matter supplied.)

Moreover, as previously indicated, the controller here has no assurance under the community property laws obtaining in California that Westberg's wages or some portion theerof which were levied upon by the District Director are not the separate property of his wife. It is clear that a delinquent taxpayer's interest in the property levied upon must be determined by State law. (*Cannon v. Nicholas,* 80 F. 2d 934; *Karno-Smith Co. v. Maloney,* 112 F. 2d 690; *United States v. Graham,* 96 Fed. Supp. 318.) The California law clearly provides that a husband and wife by agreement may change community property to the separate property of either. (*Perkins v. Sunset Tel. & Tel. Co.,* 155 Cal. 712; *Ives v. Connacher,* 162 Cal. 174; *Fay v. Fay,* 165 Cal. 469; *Siberell v. Siberell,* 214 Cal. 767; *Rothschild v. Davis,* 217 Cal.

660.) Moreover, the status of property to be acquired in the future as well as that of property presently owned may be fixed by such agreement. (*In re Harris Estate,* 169 Cal. 725; *Rogers v. Rogers,* 86 Cal. App. 2d 817; and *Cheny v. San Francisco Emp. R. System,* 7 Cal. 2d 565, where an agreement was made on the day of marriage as to earnings after marriage.)

Consequently, the mere fact that the controller here is holding wages of Westberg does not of itself give him any assurance that such are necessarily the property of Westberg. Hence, if such wages are in fact the separate property of Westberg's wife the controller would render himself liable to her by complying with the District Director's demand that such monies be turned over for Westberg's delinquent income taxes.

A comparable situation faced the court in *United States v. Stock Yards Bank of Louisville,* 231 F. 2d 628, where at pages 631-632, the court comments:

> "It should be pointed out, however, that distraint is a rough and ready remedy. This short cut form of self-help developed by the common law has been available to the government in pursuit of delinquent taxpayers since the eighteenth century. (cit.) *Where the value and nature of the taxpayer's property are not in question, distraint is no doubt a useful tool in the effective enforcement of the Internal Revenue laws. But it is a blunt instrument, ill-adapted to carve out property interests where their nature and extent are unclear.*
>
> "There is available to the government an alternative remedy well designed to resolve the issues in the

> present case. Under section 3678 of the Internal Revenue Code of 1939 (Compare section 7403 of the present code) the United States can bring suit . . . to enforce a lien . . . and name both the taxpayer and his wife co-defendants. In such a proceeding the extent of the taxpayer's interest . . . can be finally adjudicated, and the rights of all parties fully protected." (Emphasis and parenthetical matter supplied.)

Numerous cases, as may be reasonably expected, have held the federal district court to have jurisdiction to quash warrants of distraint under situations where the value and nature of the taxpayer's interest were unclear. In *Rothensies v. Ullman,* 110 F. 2d 590, the court was held to have such jurisdiction where the property levied upon was a joint bank account held by the husband and wife as tenants by entireties; in *Seattle Ass'n of Credit Men v. United States,* 240 F. 2d 906, the court entertained an action by a trustee for the benefit of unsecured creditors to quiet title to funds on which a District Director had levied for tax claims against an insolvent trustor; and in both *Cannon v. Nicholas,* 80 F. 2d 934, and *Raffaele v. Granger,* 196 F. 2d 674, a wife's action to quash warrants of distraint based upon her interest in the property levied upon were upheld.

Hence, on either of the grounds discussed, the District Court had jurisdiction to entertain the dismissed action.

Conclusion.

For the foregoing reasons it is submitted that the United States District Court committed error in dismissing the appellant's complaint since that court had jurisdiction over the persons of the defendants and of the subject matter of the action. The District Court should be ordered to set aside the order appealed from and to proceed to hear and determine the appellant's action on its merits.

Respectfully submitted,

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APPENDIX.

(1) The following provisions of the Charter of the City of Los Angeles govern the payment of wages of municipal employees:

Sec. 374 (Calif. Stats. 1925, p. 1140)—"All public money collected by any officer or employee of the city shall immediately be paid into the city treasury, without any deduction on account of any claim for fees, commissions or any other cause or pretense; and the compensation of any officer, employee or other person so collecting money shall be paid by demands on the treasury, duly audited as other demands are audited and paid."

Sec. 364 (Calif. Stats. 1925, p. 1137)—"The salary or wages of all officers and employees of the city shall be paid either monthly, semi-monthly or weekly, as the Council may by ordinance prescribe. At the expiration of the period fixed in the ordinance providing for the time of payment of such salary or wages, the board, officer or employee having the management or control of any department or office shall cause a payroll to be made out of all persons employed in such department or office during the preceding salary period, stating the amount of compensation of such persons in detail, which said payroll shall be certified as provided in this charter in the case of demands against the city. Each such payroll, duly approved by the Board of Civil Service Commissioners, as in this charter provided, shall be filed with the Controller and shall be accompanied by proper demands or pay checks for the salary or wages of each person specified therein; provided, that nothing in this article contained shall be deemed to affect or limit the provisions of Section 375 of this charter."

Sec. 371 (Calif. Stats. 1925, p. 1139)—"The Controller must keep a record of all demands on the treasury approved by him, or his objections to which have been overruled, showing the number, date, amount, and the name of the payee thereof, on what account allowed, and out of what funds payable, and it shall be a misdemeanor in office for the Controller to deliver any demand with his approval thereon, or otherwise, until this requisite has been complied with."

(2) California Code of Civil Procedure, Section 710, so far as is material to the instant action reads as follows:

* * * * * * * * *

"(a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

* * * * * * * * *

"(2) If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to dis-

charge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

"(b) The judgment debtor upon filing such abstract or transcript or affidavit shall pay a fee of two dollars and fifty cents ($2.50) to the person or agency with whom the same is filed.

"(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.

"(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript or judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such payment into court and the filing with the

county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

"(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

"(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any elective officer of this State whose salary is fixed by Section 19 of Article V of the State Constitution.

"(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund."

No. 15964

In the United States Court of Appeals for the Ninth Circuit

DAN O. HOYE, AS CONTROLLER OF THE CITY OF LOS ANGELES AND DAN O. HOYE, APPELLANTS

v.

UNITED STATES OF AMERICA AND ROBERT A. RIDDELL, DIRECTOR OF INTERNAL REVENUE, APPELLEES

On Appeal from the Order of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court rendered no opinion in making the order appealed from. (R. 27.)

JURISDICTION

This appeal arises out of proceedings by the United States to collect 1955 income taxes. On March 19, 1957, there was due and owing to the United States by Richard A. Westberg, the sum of $155.93 for 1955 income taxes. On the same date, the City of

Los Angeles was indebted to Richard A. Westberg, who was an employee of that city, in the sum of $158.78, his wages then due and owing but unpaid. (R. 4.) On the same date, the District Director of Internal Revenue, Robert A. Riddell, served upon the controller of the City of Los Angeles a notice of levy upon property in his possession belonging to Westberg. (R. 7-9.) A final demand for payment by the controller was made on June 25, 1957. (R. 9-12.) On September 10, 1957, the controller, Dan O. Hoye, appellant, filed in the District Court a complaint to quash the notice of levy and final demand, naming as defendants the United States, Riddell and Westberg. (R. 3-7, 12.) On November 8, 1957, the United States filed a motion to intervene with a proposed complaint in intervention to enforce the lien, and also a motion to dismiss the Hoye complaint. (R. 12-20.) On February 6, 1958, after a hearing on these motions, the District Court entered a formal order permitting intervention by the United States, and in its minutes, entered a direction granting the motion to dismiss the Hoye complaint. (R. 20-21.) A formal order granting the Government's motion to dismiss was entered on March 10, 1958 (R. 27), and the notice of appeal from this order was filed March 17, 1958 (R. 28-29). A motion to dismiss the appeal was denied July 2, 1958 by this Court. Jurisdiction of both this Court and the District Court is disputed; it is asserted by appellant to rest upon 28 U. S. C., Section 1291, with respect to this Court, and upon Sections 2201 and 2463, with respect to the District Court.

QUESTIONS PRESENTED

1. Whether the order of March 10, 1958, granting the Government's motion to dismiss appellant's complaint for a declaratory judgment and to quash the levy is an appealable order under 28 U. S. C., Section 1291 in view of the permission granted the United States to intervene with a suit to enforce the lien.

2. Whether, if it is an appealable order, the District Court correctly dismissed the complaint for lack of jurisdiction over the subject matter and the defendants.

STATUTES AND RULES INVOLVED

These are set forth in the Appendix, *infra.*

STATEMENT

The pertinent facts are not in dispute. On March 19, 1957, the District Director of Internal Revenue, Robert A. Riddell, served upon the controller of the City of Los Angeles a notice of levy (R. 7-9), which advised the controller that there was due, owing, and unpaid from Richard A. Westberg to the United States the sum of $155.93 for 1955 income taxes (R. 7), that demand had been made upon taxpayer to no avail, that the lien provided for by statute "now exists upon all property or rights to property belonging to the aforesaid taxpayer," and that demand was hereby being made upon the controller for such sum as he may be indebted to the taxpayer to be applied as a payment on the tax liability in whole or in part (R. 8).

The controller refused to pay over any sum to the United States, and on June 28, 1957, the District Director of Internal Revenue served a final demand upon the controller. (R. 9-12.) In this demand, the District Director advised the controller that he had previously been served with the notice of the levy, that the taxpayer still owed the United States $155.93 and that the levy had not been satisfied. (R. 9-10.) The controller's attention was called to the provisions of Section 6332 of the 1954 Code requiring a person in possession of property or rights to property, subject to levy, to surrender such property to the United States under penalty of personal liability in the sum equal to the value of the property not so surrendered but not in excess of the taxes. (R. 10-11.) The District Director renewed his demand upon the controller for any sums which he owed to the taxpayer at the time of the service of the notice of levy, and further advised the controller that if he did not comply with this final demand within five days from the date of its service, it will be deemed to be finally refused, and proceedings may be instituted by the United States as authorized by the statute. (R. 11.)

On September 10, 1957 (R. 12), the appellant Hoye, who was the controller of the City of Los Angeles, filed a complaint (hereinafter sometimes referred to as the Hoye complaint) in the District Court entitled (R. 3-7):

> Complaint to Quash a "Notice of Levy" and "Final Demand" Served on a Municipal Corporation by the Director of Internal Revenue

The complaint named as defendants the United States, Riddell and the taxpayer, Richard A. Westberg. (R. 3.) The complaint alleged the fact of the service of notice of levy of March 19, 1957, and it conceded (R. 4):

> That on said March 19, 1957, the City of Los Angeles was indebted to Richard A. Westberg in the sum of $158.78; that said sum was then payable to said Richard A. Westberg; that the plaintiff, Dan O. Hoye, as Controller of the City of Los Angeles, did thereupon hold said money because of the claim of the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue.

The complaint goes on to allege the service of the final demand on June 25, 1957, and further alleges that the controller has not paid the sum of $155.93 to the United States, Riddell or Westberg. It gives as the sole reason for non-payment, that the United States had not complied with the requirements of Section 710 of the California Code of Civil Procedure, which provide that a judgment-creditor may garnish the salary of a state employee by filing an authenticated abstract of the judgment with an affidavit stating the exact amount then due. (R. 4-5.) In his complaint, the controller expressly disclaims any interest in the money except his interest in making payment "only to the proper party." (R. 6.) The Hoye complaint further alleges that the enforcement of the levy would cause the controller to breach his duty as a public official and make him personally liable for any money paid to the United States. Ac-

cordingly, the complaint prays for an order, determining that the controller is not bound by the levy or final demand, that the levy and final demand be quashed, and that the court determine that the controller is bound to pay to the United States any money due to other persons, only upon the filing of the abstract of the judgment and affidavit as required by Section 710 of the California Code of Civil Procedure. (R. 6.)

On November 8, 1957, the United States filed a notice of motion to intervene on the ground that it had not consented to be sued and was not subject to the jurisdiction of the Court as a defendant, that leave to intervene be authorized and that the United States has an interest in the matter being litigated and is a necessary and proper party to a complete determination. It also appended its proposed complaint in intervention. (R. 12-18.) At the same time, as defendants to the Hoye complaint, the United States and Riddell filed a motion to dismiss the action for lack of jurisdiction over the United States and over the subject matter, and because the District Director was not a proper party. (R. 18-19.)

On February 6, 1958, after hearing on all of the motions, the District Court granted the motions to dismiss the Hoye complaint and also granted the Government's motion to intervene. (R. 21.) The formal order permitting intervention by the United States was entered the same day. (R. 20-21.) The formal order granting the motion to dismiss was entered on March 10, 1958, reading as follows (R. 27):

ORDER GRANTING MOTION TO DISMISS

> Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above-entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this is not a final order under Fed. R. Civ. P. 54(b), since the United States of America has filed its complaint in intervention.

In the meantime, the Government had filed an amended complaint in intervention, alleging two causes of action: *First*, against appellant Hoye for $155.93 and interest and costs based on his refusal to surrender the property or rights to property of the taxpayer, in accordance with the notice of levy and final demand (R. 22-24); and *second*, against Hoye, the City of Los Angeles and the taxpayer for foreclosure of the tax lien. (R. 24-26). The jurisdiction of both causes of action is expressly rested upon 28 U.S.C., Sections 1340, 1345, and Sections 6332, 7401 and 7403, Internal Revenue Code of 1954. On March 17, 1958, Hoye as controller and individually filed a notice of appeal from the order of March 10, granting the motions to dismiss his complaint. (R. 28-29.) A motion to dismiss this appeal was denied by this Court July 2, 1958.

SUMMARY OF ARGUMENT

I. The order of the District Court, dismissing the complaint for declaratory judgment and to quash the levy is not an appealable order. The effect of the

Government's suit in intervention was to raise multiple claims against the controller on his personal liability for failure to surrender the levied property and against the controller, the City and the taxpayer to foreclose the lien on the levied property. Hence, Rule 54(b) is applicable, and the negative certificate of the District Court that its order adjudicating less than all of the claims was not final is conclusive. Aside from Rule 54(b), the order is not appealable since it does not determine the main issues in litigation. The issue presented by the dismissed complaint—whether a federal tax levy on accrued wages of municipal employees is ineffective for failure to comply with the state procedure for garnishment of salaries of such employees—is precisely the issue presented by the Government's suit to recover on the levy by recourse to the controller's personal liability for failure to honor the levy. In any case, if other issues are presented by the dismissed complaint, they are fully embraced by the second cause of action of the Government's suit, to adjudicate all claims to the levied property in the foreclosure of its lien. The order does not determine any separate, collateral issues to the prejudice of appellant, pending final determination of the main issues. It has been authoritatively held that an order denying a motion to quash an attachment is not appealable, since in such a situation the rights of all parties can be adequately protected while the litigation on the main claim proceeds.

II. If the order is appealable, the dismissal of the suit to quash the levy was correct. The suit is one

to enjoin the collection of taxes prohibited by basic policy set forth in the express provisions of Section 7421 of the 1954 Internal Revenue Code and the Declaratory Judgments Act, 28 U. S. C., Section 2201. Contrary to appellant's assertion, no jurisdiction is afforded to the District Court by the Declaratory Judgments Act, especially in view of the express exception from its purview of any controversy "with respect to Federal taxes." Appellant is not a person claiming ownership of property who is allowed to sue to enjoin the taking of his property to satisfy the tax obligations of another. On the contrary, appellant has expressly disclaimed any ownership interest in the property; his interest is only that of a stakeholder or trustee, which does not justify any exception to the basic policy prohibiting suits to enjoin the collection of taxes.

Nor is jurisdiction of the District Court afforded by 28 U.S.C., Section 2463, which prohibits replevy of distrained property. No question of liability of the controller to third persons is presented here, since concededly the levied debt is owing to the delinquent taxpayer and payment to the Government pursuant to the levy is a complete defense as against claims of taxpayer. There is no basis for the suggestion made in this Court for the first time of a possible interest by taxpayer's wife in the money levied upon. In any event, such a claim is inconsistent with appellant's pleading and cannot be raised for the first time on appeal. Moreover, the second cause of action in the Government's suit now pending in the District Court will result in a final adjudication of all claims to the levied property.

ARGUMENT

I.

The Order Of The District Court Dismissing The Complaint To Quash The Levy, In View Of The Permission Granted The United States To Intervene And File A Complaint In Intervention To Enforce The Lien, Is Not An Appealable Order

In Point I of his brief (pp. 9-11) appellant argues that the order appealed from is a final and appealable order. Since we do not agree and since appellant raises the issue, we express our views in this Point I and request respectfully permission to renew our motion to dismiss this appeal, (heretofore denied, as stated above on July 2, 1958).

This appeal comes to this Court under the following circumstances: the United States, by its District Director of Internal Revenue, filed a notice of levy to enforce its lien for income taxes due and unpaid upon property or rights to property of the taxpayer in the hands of the controller of the City of Los Angeles. The controller, conceding that he held accrued wages, payable to the taxpayer in the full amount of the lien, refused to surrender the property upon the ground that the United States had failed to comply with the state procedure for the collection of a debt owed to a debtor in the hands of a municipal official. Instead, the controller, holding on to the funds, filed a complaint in the District Court to quash the levy, seeking a declaration that the United States was bound to follow the state procedure. On its view that the court had no jurisdiction of this suit, the United States filed an authorized motion to

intervene, with an application for leave to file a complaint in intervention to obtain payment and to enforce the lien. The District Court granted the Government's motion to intervene with leave to file such a complaint, and dismissed the controller's complaint. The controller has not appealed from the order of the District Court granting the intervention, but has only appealed from the order dismissing his complaint.

In this context, we submit that the order dismissing the complaint to quash the levy, while allowing the litigation to proceed upon the Government's suit to enforce the lien and levy, is not an appealable order under 28 U. S. C., Section 1291, Appendix, *infra*. Under Rule 54(b) of the Federal Rules of Civil Procedure, Appendix, *infra*, the negative certificate of the District Court that the order is not a final one is conclusive. Aside from Rule 54(b), the order is not appealable, since it is not a final order on the main issues in litigation, nor does it finally determine, to the prejudice of appellant, any collateral question distinct and separate from the main issues in litigation, still pending before the District Court.

A. ***Under Rule 54(b), the negative certificate of the District Court that its order is not final is conclusive***

The effect of the Government's complaint in intervention is to raise multiple claims (1) against appellant on his personal liability for failure to surrender the levied property; and (2) against appellant, the City and the taxpayer to foreclose the lien

on the levied property. Hence, Rule 54(b) is applicable, and the negative statement of the District Court as to the non-appealability of its order dismissing the Hoye complaint is conclusive. The conclusive nature of a negative statement of a District Court, that its order denying less than all of the claims in a case presenting multiple claims is not appealable, is settled and needs no argument in this Court. *Island Service Co.* v. *Perez*, 255 F. 2d 559; *Walter W. Johnson Co.* v. *Reconstruction Finance Corp.*, 223 F. 2d 101. The case of *Audi Vision, Inc.* v. *R. C. A. Mfg. Co.*, 136 F. 2d 621 (C. A. 2d), and the other cases cited by appellant dealing with the partial adjudication of multiple claims (Br. 8-11) are not in point, since they were decided without consideration of the 1946 amendment to Rule 54(b) of the Federal Rules of Civil Procedure, which conferred conclusive authority upon the District Court to negative the appealability of such an order. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427.

B. ***Aside from Rule 54(b), the order of the District Court is not appealable since it does not determine the main issues in litigation nor any separate collateral question, to the prejudice of appellants, pending final determination of the main issues***

Aside from Rule 54(b), the order of the District Court dismissing the Hoye complaint to quash the levy, while maintaining the litigation on the Government's suit to enforce the levy, is not appealable. It does not determine the main issues raised by the Hoye complaint. Indeed, the Hoye complaint raised only one issue: whether a federal levy upon the sal-

ary of a tax-delinquent municipal employee must conform to the requirements of state law with respect to the garnishment of the salaries of municipal employees. That is precisely the issue presented in the first cause of action in the Government's suit, now pending in the District Court, to enforce the levy by recourse to the personal liability of the controller, upon his failure to honor the levy. *Sims* v. *United States*, 252 F. 2d 434 (C. A. 4th), pending on petition for certiorari. This liability of the controller is simply a necessary incident to the validity of the levy, just as a garnishee becomes personally liable for failure to honor a garnishment. *Brashear* v. *West*, 1 Pet. 607, 618; California Code of Civil Procedure, Section 544. The only difference is that, in a case of a federal tax levy, the notice of levy takes the place of a judgment or other processes under state procedure. *Sims* v. *United States*, *supra; United States* v. *Eiland*, 223 F. 2d 118, 121 (C. A. 4th). In any event, the Government's second cause of action, to foreclose the lien and recover on the levy, embraces all possible issues raised by the Hoye complaint, including "the proper person to whom payment of the funds levied upon should be made." (Br. 9.) *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal.), affirmed, *sub nom. State of California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831; *United States* v. *Newhard*, 128 F. Supp. 805 (W.D. Pa.).

No appealable order, deciding a collateral question distinct from the main issues to the prejudice of appellant pending determination of the main issue,

is presented by this appeal. Such an appeal is allowed as an exception to the requirement that an appealable order finally determine the issues in litigation, only where an order, though not a final order on the main issues, determines a separate, collateral question, which will escape review on the appeal from an adjudication of the main issues, and which in the meantime inflicts irreparable injury upon the appellant. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541; *Swift & Co.* v. *Compania Colombiana*, 339 U. S. 684. The instant order dismissing the suit to quash the levy is analogous to an order overruling a motion to quash an attachment, and in *Swift & Co.* v. *Compania Colombiana*, *supra*, the Court held that such an order was not appealable, since as the Court said (339 U. S., p. 689) "In such a situation the rights of all parties can be adequately protected while the litigation on the main claim proceeds." [1]

The appellant here cannot show any prejudice from the dismissal of his suit to quash the levy while the Government's suit to enforce the levy proceeds in the District Court. His position remains the same. He holds the funds pending determination of the validity

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[1] While the decision in *Swift & Co.* was on the appealability of an order *granting* a motion to quash an attachment, the above quoted holding as to the non-appealability of a ~~motion~~ *overruling* a motion to quash an attachment is not dicta, but essential to the decisive reasoning of the case, that a collateral order is appealable only if it escapes review of the final determination of the litigation and imposes irreparable injury on the appellant. *Great Lakes Towing Co.* v. *St. Joseph-Chicago S.S. Co.*, 253 Fed 635 (C.A. 7th) is an earlier decision also holding that a motion *denying* an attachment lien is appealable.

of the levy, and his personal liability for the amount of the levy is, in these circumstances, purely technical.[2] In short, all that the District Court has done by its order dismissing the Hoye complaint is to direct that the issues of the validity of the Government's levy, challenged by the Hoye complaint, be determined in the Government's suit to enforce the levy. This order on any view is not an appealable one. Furthermore, regardless of the Government's suit in intervention, the Hoye complaint to quash the levy required dismissal because, as we shall now show, it is a prohibited suit to enjoin the collection of taxes by way of a declaratory judgment.

II.

If The Order Is Appealable, The District Court Correctly Dismissed The Complaint

This branch of the case involves the jurisdiction of the District Court over the Hoye complaint. We submit that the suit is barred by express statutory prohibitions; there is no basis for jurisdiction as asserted by appellant, either under 28 U. S. C., Sections 2201 or 2463, Appendix, *infra*.

A. *The suit is barred by express statutory prohibitions that have been repeatedly enforced by the courts*

The suit by the controller is on its face a suit to enjoin the collection of federal income taxes and for declaratory judgment. The District Court has no

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[2] The controller's liability for interest and costs is exactly the same, if, on the merits, he had lost his suit to quash the levy, as it is, if the Government's suit to enforce the levy proves successful.

jurisdiction over such a suit because it is expressly barred by the statutory prohibitions against such suits set forth in Section 7421 of the 1954 Internal Revenue Code and the Declaratory Judgments Act as amended, 28 U. S. C., Section 2201. This statutory rule prohibiting injunction of tax collections is founded upon a basic policy to protect the federal tax powers essential to the Government, and was first enacted by the Act of March 2, 1867, c. 169, 14 Stat. 471, Sec. 10. It has been repeatedly enforced by the courts and constitutes an established principle of federal tax law. *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *DuPont*, 262 U. S. 234, 254-255; currently reaffirmed in *Flora* v. *United States*, 357 U. S. 63, 75.[3]

B. *The District Court does not have jurisdiction under 28 U. S. C., Section 2201, the Declaratory Judgments Act*

Appellant's assertion that the District Court had jurisdiction of the Hoye complaint under the Declaratory Judgments Act (Br. 12-16) ignores the explicit statutory bar, contained in the exception to that Act, of any controversy "with respect to federal taxes."

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[3] The same prohibition is commonly found in state laws to protect state revenue. California Constitution, Art. 13, Sec. 15; *Helms Bakeries* v. *State Bd. of Equal.*, 53 Cal. App. 2d 417, 128 P. 2d 167, certiorari denied, 318 U. S. 756; *Casey* v. *Bonelli*, 93 Cal. App. 2d 253, 208 P. 2d 723. And federal law prohibits any action in the federal courts to enjoin the collection of state taxes, where there is an adequate remedy under state law. 28 U.S.C., Section 1341. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293.

The predecessor of Section 2201, 28 U. S. C., was Section 274D of the Judicial Code, which was amended by Section 405, Revenue Act of 1935, c. 829, 49 Stat. 1014, to remove from its operation any controversy "with respect to Federal taxes." The Senate Report on the Revenue Act of 1935 states (S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939) (1939-1 Cum. Bull. 651, 657)):

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

The case of *Tomlinson* v. *Smith*, 128 F. 2d 808 (C. A. 7th), cited by appellant (Br. 12-14), affords him no support. There, an action by a mortgagee to declare the mortgage lien superior to that of the United States and to restrain the Collector from proceeding with the distraint was permitted to be maintained. There, the tax was not owed by the plaintiff and the holding in substance was that the prohibition against suits to enjoin the collection of taxes

does not "prevent judicial interposition to prevent a collector from taking the property of one person to satisfy the tax obligation of another." *Raffaele* v. *Granger*, 196 F. 2d 620, 623 (C. A. 3d). See also *Long* v. *Rasmussen*, 281 Fed. 236 (Mont.); *Rothensies* v. *Ullman*, 110 F. 2d 590 (C. A. 9th); *Seattle Ass'n of Credit Men* v. *United States*, 240 F. 2d 906 (C. A. 9th); *Cannon* v. *Nicholas*, 80 F. 2d 934 (C. A. 10th). But in each of these cases, the suit was brought by the person claiming ownership of the property, who was threatened with immediate loss of the property by imminent sale or distraint of the property by the United States for the tax obligations of another.

Here, however, the appellant controller makes no claim that he or the City of Los Angeles has any property in the debt which has been levied upon; the suit is not in protection of any property interest in the debt. (R. 6.) He has none and further he admits in his complaint that the City is indebted to taxpayer and that as controller he is holding the money because of the claim of the United States and of the Director. (R. 4.) The holding of the *Tomlinson* case and the other cases immediately above cited obviously has no application to the instant facts and affords no warrant for the action brought by the appellant.

It is therefore respectfully submitted that the holding to the contrary by the District Court (Judge Hall) in *Hoye* v. *United States*, 109 F. Supp. 685 (S. D. Cal.) (1953), is in error and the later ruling of the same District Court in the order here appealed from (Judge Tolin) is correct. In the cited case,

Judge Hall relied on *Tomlinson* v. *Smith*, *supra*, although he noted that in that case the plaintiff claimed a prior lien. Nevertheless, the court considered the situation in *Tomlinson* analogous to the case before him, where the City of Los Angeles merely held as trustee the money which was there due to the taxpayer, its employee or pensioner. (p. 686.) On the contrary, we submit that the two situations are not analogous. Indeed, the prohibition against suits restraining the collection of taxes would be an empty form, if all persons holding property concededly belonging to the taxpayer—and in which the holder himself claims no interest—might prevent distraint and collection by bringing action for injunction or declaratory judgment.

The other ground upon which Judge Hall proceeded in the cited case was that, had the controller recognized the levy by the Collector, he would still be liable to pay the same amount again to taxpayer under the terms of Section 710 of the California Code of Civil Procedure, since there was not filed with him a copy of a judgment in favor of the Collector. As already pointed out, it has recently been held that similar state law provisions must yield to the federal statutes with respect to collection of taxes. *Sims* v. *United States*, *supra*; *United States* v. *Newhard*, *supra*. See also Rev. Rul. 55-227, 1955-1 Cum. Bull. 551.

Moreover, to the extent that the Government seeks only by its levy to obtain what is due to taxpayer from his debtor, the City of Los Angeles, this Court, in accord with the Fourth Circuit has squarely held that "payment to the Government pursuant to levy

and notice is a complete defense to the debtor against any action brought against him on account of the debt." *Bank of Nevada* v. *United States*, 251 F. 2d 820, 828, certiorari denied, 356 U. S. 938; *United States* v. *Eiland*, 223 F. 2d 121, 122 (C. A. 4th).

The ruling by Judge Hall in *Hoye* v. *United States*, *supra*, was technically a denial of a motion by the Government and the Collector to dismiss the complaint and, hence, was not appealable. The records of the Department of Justice show that the Government filed an answer, but the case never went to trial and was dismissed on stipulation following payment of the tax by the taxpayer.

C. *The District Court does not have jurisdiction under 28 U. S. C., Section 2463*

Section 2463 is a further reinforcement of the prohibition against suits to enjoin the collection of taxes; its express purpose is to prohibit replevy of distrained property. It assuredly does not carve out any exceptions to the prohibition of Section 7421 or, of the Declaratory Judgments Act; at most it simply affords an affirmative basis for jurisdiction of a suit that is not prohibited. *Seattle Ass'n of Credit Men* v. *United States, supra.*

Appellant's contention that jurisdiction is afforded by Section 2463 rests upon a two-fold assertion that such a suit is maintainable where (a) "the holder of the property levied upon would not be exonerated from personal liability by acceeding to the demand", and (b) where "the property levied upon belonged to a third party and was being taken to satisfy the taxes of another." (Br. 17.) Neither ground is

present here. On the first ground, appellant cites *United States* v. *Penn Mut. Life Ins. Co.*, 130 F. 2d 495 (C. A. 3d), and *United States* v. *Winnett*, 165 F. 2d 149 (C. A. 9th). These cases are, however, not in point. *Penn Mut. Life Ins. Co.* was a suit by the United States against an insurance company to enforce a levy upon it for the value of taxpayer's interest in certain policies. The court dismissed the suit on the ground that the insurer did not hold any ascertainable property or property rights of the taxpayer. In *Winnett*, the suit was also by the United States against the maker of a note due a delinquent taxpayer, to enforce a levy thereon, and the holding of the case is confined to a ruling that the taxpayer's leviable interest in the note was subject to a prior written agreement endorsed on the note, granting a set-off to the maker.

Neither case in any way touches upon the issue here, whether a person holding levied property of taxpayer and disclaiming any interest in the property can sue to enjoin the levy. The statements in both cases, that enforcement of the lien would not exonerate the taxpayer's debtor from liability to others on account of their interest in the property, referred solely to the accepted rule that the United States as creditor can levy upon the debt or other property of a taxpayer only to the extent that the property belongs to the taxpayer, and that accordingly if the person levied upon paid over property of others he would also be liable to them. There is no such problem in the case at bar; appellant himself alleges in his complaint that the property levied upon was accrued wages, due and "payable to said

Richard A. Westberg", the taxpayer here. (R. 4.) As already stated, to the extent that the Government only seeks by its levy to obtain what was due to the taxpayer from his debtor, the City of Los Angeles, payment to the Government is a complete defense to the debtor. *Bank of Nevada* v. *United States*, *supra; United States* v. *Eiland*, *supra.*

Appellant's second asserted ground for jurisdiction under Section 2463, that he was justified in refusing to surrender the wages due and payable to the taxpayer because the wages might, by agreement between the taxpayer and his wife, be her separate property (Br. 7, 18-20), is equally pointless. Indeed, appellant is precluded from asserting this ground, since he did not allege any such question in his complaint, which as noted, flatly stated that the wages were payable to the taxpayer; nor was this contention raised in the argument on the motions below. *Dally* v. *Commissioner*, 227 F. 2d 724, 726 (C. A. 9th). Moreover, the alleged dilemma with which appellant is supposedly confronted by the possibility of taxpayer's wife's claim to his wages, by private agreement between them, is unreal. Under California law, such a transfer is void against creditors without notice, *Wilson* v. *Grey*, 49 Cal. App. 2d 228, 121 P. 2d 514; *Ramsdell* v. *Fuller*, 28 Cal. 37, and under federal law, such an inchoate right could not defeat the lien of the United States for taxes. (*Bank of Nevada* v. *United States*, *supra; United States* v. *Heffron*, 158 F. 2d 657 (C. A. 9th) certiorari denied 331 U.S. 831.

But even if the possibility of a possible wife's claim could now be raised for the first time on appeal and even if it had any possible substance, it would not,

under these hypothetical circumstances, afford any basis for appellant's suit to quash the levy. The claim, if it exists, is one for its owner to assert, and as far as the appellant's suit is concerned, its possible existence is a good reason for the dismissal of appellant's suit to make way for the Government's suit now pending before the District Court in which a final adjudication of all claims to the property levied upon can be made. See *United States* v. *Stockyards Bank of Louisville*, 231 F. 2d 628, 631-632 (C. A. 6th). That case, cited by appellant (Br. 19), supports the instant decision of the court below in dismissing appellant's suit to quash the levy. The other cases cited by appellant in the closing of his brief (p. 20), *Rothensies* v. *Ullman*, *supra; Seattle Ass'n of Credit Men* v. *United States*, *supra; Cannon* v. *Nicholas*, *supra; Raffaele* v. *Granger*, *supra*, have already been discussed. They are not in point because, as we have shown, each is a case in which the court permitted a suit to enjoin the collection of taxes, brought by a person claiming that the Government was taking his property for the payment of the tax obligation of another.[4]

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[4] It may be noted that in the cited cases where the exceptional suit to enjoin the collection of taxes by a third party was allowed, the Government did not, as here, file a complaint in intervention, but litigated the issues of its right to collect the taxes in the suit to quash the levy. It may well be that, even in these cases, had the Government filed an intervening complaint to collect the taxes and adjudicate the claims to the property under Section 7403, a dismissal of the third party suit would, as here, be both correct and, under the reasoning of *Swift & Co.* v. *Compania Colombiana*, *supra*, non-appealable since the enforcement of the lien would obviously be stayed pending the outcome of the Government's

The appellant has disclaimed any interest in the property as such; his interest, as already noted, is simply that of a stakeholder or trustee, and that is not enough to justify an exception from the fundamental policy prohibiting suits to enjoin the collection of taxes.

CONCLUSION

The appeal from the order of the District Court should be dismissed, or if the order is appealable, it is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1958.

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action and the rights of the parties adequately protected "while the litigation on the main claim proceeds." The entertainment of a suit for declaratory judgment is discretionary and in the exercise of a sound discretion the court may decide to permit the issues to be adjudicated in the action brought by the United States. *New York Milk Shed Transportation* v. *Meyers*, 144 F. Supp. 174 (N.D. N.Y.).

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Supp. II, Sec. 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his

delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person", as used in subsection (a) includes an officer or em-

ployee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U. S. C. 1952 ed., Supp. II, Sec. 6332.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.* — The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court

in respect to the interests of the parties and of the United States.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7403.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

28 U. S. C.:

SEC. 1291 [as amended by Sec. 48 of the Act of October 31, 1951, c. 655, 65 Stat. 710]. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

SEC. 2201 [as amended by the Act of August 28, 1954, c. 1033, 68 Stat. 890]. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested

party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2463. *Property taken under revenue law not repleviable.*

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Federal Rules of Civil Procedure:

RULE 54.

* * * *

(b) [as amended December 27, 1946] *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

* * * *

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No. 15964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles and Dan O. Hoye,

Appellant,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

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UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

Appellees' Statement of the Case.

The appellees erroneously construe the appellant's complaint by asserting (Br. p. 5) that the sole reason for the appellant's admitted failure to turn over any of the sum levied upon is that the United States had not complied with the requirements of Section 710 of the California Code of Civil Procedure.

The question of the proper parties to whom such payment should be made, the appellant's inability to discharge his duty as a public official by such payment, and the fact that such payment would not exonerate the appellant from personal liability for the sum paid over, are additional reasons alleged in paragraph VI of the complaint [Tr. p. 6] and form further bases for the appellant's contention

that the District Court had jurisdiction of his action. These allegations likewise negative the appellees' assertion that no question of liability of the controller to third persons is presented (Br. p. 9). While it is true that the argument as to the probable identity of such persons was not pressed in the District Court, that issue is clearly framed by the pleadings and is not a matter raised for the first time upon this appeal as contended by the appellees. In any event, where injustice might otherwise result, an appellate court may consider questions of law which were neither pressed nor passed upon by the court or administrative agency below (*Hormel v. Helvering,* 312 U. S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 1037).

The District Court Has Jurisdiction Under the Declaratory Judgments Act and Under 28 U. S. C., Section 2463.

The appellees concede that the District Court would have jurisdiction of an action under the Declaratory Judgments Acts (28 U. S. C., Sec. 2201) where a suit was brought by a person claiming ownership of the property levied upon which was threatened by imminent sale or distraint by the United States for the tax obligations of another (Br. p. 18). The appellees then attempt to distinguish the appellant's situation by contending that his action was not to protect any property interest of the appellant in the debt owing by the city to the taxpayer. This analysis overlooks the substance of the matter, however, for if the appellant controller is not exonerated from personal liability upon turning over to the government the property levied upon then it follows that upon the event of the imposition of such personal liability, his property is effectively taken to satisfy the tax obligations

of another. Under these circumstances, the government is merely attempting to do indirectly that which it cannot do directly.

The same reasoning supports the appellant's position that jurisdiction of the District Court also exists pursuant to 28 U. S. C., Section 2463.

The Order of the District Court Is a Final Decision and Appealable Under 28 U. S. C., Section 1291.

The appellees' contention as to the non-appealability of the order dismissing the appellant's complaint is bottomed upon the premise that appellant Hoye is in no way prejudiced by such order since the issues raised in his action are still pending in the government's suit in intervention (Br. pp. 12-15). This position overlooks, however, the fundamental fact that if appellant Hoye was entitled to have the levy and final demand quashed he could not then be subjected to the necessity of defending a punitory action based upon Section 6332 of the Internal Revenue Code of 1954 wherein the government would seek to impose personal liability upon him. The District Court in dismissing the appellant's action thrust this very situation upon the appellant by permitting the government's suit in intervention in which the first cause of action is so based. Obviously, but for the first cause of action, the appellant would have no quarrel with the suit in intervention since the matter then is merely one based upon the second cause of action for the foreclosure of a tax lien in which his personal liability is not involved. Additionally, assuming a judgment upon this second cause of action favorable to the government, a situation is presented whereby there would be substantial compliance with the provisions of Section 710 of the California Code of Civil

Procedure so that payment by Hoye to the government in accordance with such judgment would exonerate him from any personal liability thereafter. To say that Rule 54(b) of the Federal Rules of Civil Procedure authorizes a procedural device whereby the appellant's rights may be short-circuited as has been done in this case is to ignore the fundamental purpose of those rules to serve the interests of justice rather than form.

Conclusion.

The order of the District Court dismissing the appellant's action should be reversed.

Respectfully submitted,

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No. 15966

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner and Respondent,

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC., THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER, INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO, and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,
Respondents and Petitioners.

Transcript of Record

Petition to Enforce and Petitions to Review Order of
The National Labor Relations Board

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—7-11-58

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NATIONAL LABOR RELATIONS BOARD,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

GENERAL COUNSEL'S EXHIBIT No. 1-H

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1374 — Mountain Pacific, Seattle, and Tacoma Chapters of the Associated General Contractors of America, Inc.,

and

Case No. 19-CB-424 — International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO,

and

Case No. 19-CB-445—Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO,

and

Cyrus Lewis, Charging Party.

CONSOLIDATED COMPLAINT

V.

In the year of 1955, the AGC Chapters, acting in concert, entered into a collective bargaining agreement with the Council, effective January 1, 1956, herein referred to as the 1956 Agreement. The AGC Chapters, in agreeing to, executing and promulgating said 1956 Agreement, acted for and in behalf of their respective employer members. The Council, in

General Counsel's Exhibit No. 1-H—(Continued) agreeing to executing and promulgating said 1956 agreement, acted for and in behalf of its member local unions, including Local 242.

VI.

The 1956 Agreement provides inter alia

"Recruitment of Employees

"6. To maintain employment, to preserve workable labor relations, to proceed with private and public work, the following accepted prevailing practices shall continue to prevail in the hiring of workmen:

"(a) The recruitment of employees shall be the responsibility of the Union and it shall maintain offices or other designated facilities for the convenience of the contractors when in need of employees and for workmen when in search of employment.

"(b) The contractors will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.

"(c) Should a shortage of workmen exist and the contractor has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours, Saturdays, Sundays and holidays excluded, the contractor may procure workmen from other sources.

"(d) Either party to this Agreement shall have the right to reopen negotiations pertaining to Union security by giving the other party thirty (30) days written notice, when there is reason to believe that

General Counsel's Exhibit No. 1-H—(Continued)

the laws pertaining thereto have been changed by Congressional Amendments, Court Decisions, or governmental regulations."

The "contractors" and the "Local Union" referred to in the 1956 Agreement were the employer members of the AGC Chapters and the member local unions of the Council respectively.

VII.

At all times since January 1, 1956, the AGC Chapters and their respective employer members and the Council and its member local unions, including Local 242, have published, maintained and continued in effect the 1956 Agreement with respect to the wages, hours, and working conditions of persons employed by the employer members of the AGC Chapters as hodcarriers, building and common laborers, and in the selection of such persons for hire.

VIII.

While the 1956 Agreement was being continued in effect, at all times since January 1, 1956, Local 242 and the Council were labor organizations which were obligated to procure employment for their members in preference to non-union men.

IX.

While the 1956 Agreement was being continued in effect, at all times since January 1, 1956, Local 242 and the Council, in the conduct of the functions of each of them, particularly with respect to the re-

General Counsel's Exhibit No. 1-H—(Continued)

cruitment of applicants for employment and in dispatching applicants to available jobs, have given preference to applicants who are members of said labor organizations.

X.

Lewis, during the six-month period prior to his filing charges herein, and since then, has sought employment in the Seattle area as a hodcarrier, building and common laborer. Lewis repeatedly reported his availability for work at the hiring hall of Local 242, where employee members of Local 242 were being dispatched to fill jobs in the aforesaid classifications with employer members of the AGC Chapters. Prior to filing his charges herein, Local 242 refused to dispatch Lewis for such employment and denied him employment opportunities in numerous instances when jobs with the employer members of AGC Chapters were available and unfilled. Since filing his charges herein, Local 242 has dispatched Lewis to jobs intermittently, using these occasions to induce Lewis to withdraw his charges.

XI.

The AGC Chapters, during the six-month period prior to the filing of charges by Lewis, and since then, (1) by continuing the 1956 Agreement in effect with the Council, wherein it was provided that member local unions of the Council were to function as the employment recruiting office and hiring hall of the employer members of the AGC Chapters, in the absence of providing affirmative

General Counsel's Exhibit No. 1-H—(Continued)
assurances against discrimination in the selection of employees for hire, and by continuing the 1956 Agreement in effect with labor organizations which (2) were obligated to give preference to their members in dispatching applicants for employment, and (3) did give such preference to their members, have been and are fostering and establishing hiring practices among the employer members of the AGC Chapters which have discriminated with respect to the hire of Lewis and other non-union workmen, to encourage membership in a labor organization in violation of Section 8 (a) (3) of the Act, and thereby have been and are interfering with, restraining and coercing employees and applicants for employment in the exercise of their right as guaranteed in Section 7 in violation of Section 8 (a) (1) of the Act.

XII.

The Council, during the six-month period prior to the filing of charges by Lewis, by continuing the 1956 Agreement in effect under the circumstances and in the manner specified in Paragraph XI, has been and is fostering and establishing hiring practices which caused the employer members of the AGC Chapters to discriminate with respect to Lewis and other non-union workmen to encourage membership in a labor organization, as proscribed by Section 8 (a) (3) of the Act, in violation of Section 8 (b) (2) of the Act, and by such deprivation of employment said Council has been and is coercing and restraining employees and applicants for

General Counsel's Exhibit No. 1-H—(Continued)
employment in the exercise of their rights as guaranteed in Section 7 in violation of Section 8 (b) (1) (A) of the Act.

XIII.

Local 242, since January 1, 1956, by continuing the 1956 Agreement in effect in governing the functions of Local 242 under the circumstances and in the manner specified in Paragraph XI, and by invoking its provisions when administering it, and by the conduct of Local 242 with respect to Lewis as described in Paragraph X, has been and is causing employer members of the AGC Chapters to discriminate as proscribed by Section 8 (a) (3) in violation of Section 8 (b) (2) of the Act, and by such conduct and in refusing Lewis job opportunities Local 242 has been and is coercing and restraining employees in the exercise of their rights as guaranteed in Section 7 in violation of Section 8 (b) (1) (A) of the Act.

* * * * *

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19, 407 U. S. Court House, Seattle 4, Wash.

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding was initiated by three charges

filed by Cyrus Lewis with the National Labor Relations Board (also referred to below as the Board). The first was filed on May 11, 1956, in Case No. 19-CB-424 against the Respondent, International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO (also referred to herein as Local 242); the second on August 7, 1956 in Case No. 19-CA-1374 against the Respondents, Mountain Pacific Chapter of the Associated General Contractors, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter (also referred to herein collectively as the AGC Chapters or the Chapters, and respectively as the Mountain Pacific Chapter, the Seattle Chapter, and the Tacoma Chapter;[1] and the third on September 13, 1956 in Case No. 19-CB-445 against the Respondent, Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO (also described herein as the District Council). On September 20, 1956, pursuant to the Board's Rules and Regulations, Series 6, the Regional Director of the Nineteenth Region of the Board duly entered an order consolidating the three cases. Based upon the charges, the General Counsel of the Board issued a complaint on September 20, 1956, alleging that

[1] Based upon a stipulation of the parties, filed with me subsequent to the hearing, I amend the record, including the caption of this proceeding, to show the correct names of the Chapters which are those set out above. The stipulation is hereby made a part of the record.

Local 242, the District Council, and the AGC Chapters had engaged, and were engaging, in unfair labor practices within the meaning of the National Labor Relations Act, as amended (61 Stat. 136-163), also referred to below as the Act. Each of the said Respondents has been duly served with a copy of the charge applicable to it; of the order of consolidation; and of the complaint.

With respect to the claimed unfair labor practices, the complaint alleges, in sum, that the AGC Chapters have interfered with, restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8 (a) (1) of the Act; that Local 242 and the District Council, as labor organizations, have caused employers to discriminate against Lewis and others in violation of Section 8 (a) (3), thus violating Section 8 (b) (2) of the Act; and that by such conduct the said labor organizations have restrained and coerced employees in the exercise of rights guaranteed them by Section 7, thus violating Section 8 (b) (1) (A) of the said Act.

Each of the Respondents has filed an answer in which it denies the commission of the unfair labor practices imputed to it in the complaint.

Pursuant to notice duly served upon all parties, a hearing was held before me, as duly designated Trial Examiner, on October 26 and 27, 1956, at Seattle, Washington. Each of the parties, with the exception of Lewis, was represented by counsel at the hearing. The parties were afforded a full opportunity to be heard, examine and cross examine wit-

nesses, adduce evidence, file briefs, and submit oral argument. I reserved decision on a motion, made after the close of the evidence by Local 242 and the District Council, to dismiss the allegations of the complaint applicable to them. The findings and conclusions made below dispose of the motion. The General Counsel and the Seattle and Tacoma Chapters have filed briefs which have been read and considered. The other parties have waived their right to file briefs.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Nature of the business of the AGC Chapters; their status as employers; jurisdiction

Each of the AGC Chapters is a corporate association of employers who are engaged, as contractors, in the construction business and have their principal places of business in the western part of the State of Washington. The respective principal offices of the Mountain Pacific and Seattle Chapters are located in Seattle, Washington. The Tacoma Chapter maintains its principal office in Tacoma, Washington.

Each of the Chapters, for and on behalf of its members, performs the function of negotiating and entering into collective bargaining agreements with labor organizations. These agreements prescribe wages, hours and conditions of employment affecting individuals employed by such members. The

Chapters customarily negotiate and enter into such agreements jointly, conducting the negotiations through a group of individuals made up of members of a labor committee maintained by each of the Chapters. This procedure was followed in 1955 in negotiating a collective bargaining agreement currently in effect between the AGC Chapters and the District Council. (More specific reference will be made to this contract below.) By reason of the representative status of the AGC Chapters and their joint procedures in negotiating and executing collective bargaining agreements, the Chapters and their members constitute a single employer within the meaning of Section 2 (2) of the Act. The assertion of jurisdiction over the subject matter of this proceeding may thus properly be based upon the operations in, or affecting, interstate commerce of members of any or all of the Chapters.[2]

In 1955, members of the Seattle Chapter performed construction work of the aggregate value of $26,586,361 for enterprises which annually ship goods valued in excess of $100,000 in interstate commerce. During that year, members of the Seattle Chapter performed work of the aggregate value of $23,431,353, under contract with the United States Government, on installations directly related to the national defense. In 1955, also, members of the Seattle Chapter performed construction work of the total value of $20,773,717 on construction projects located outside the State of Washington.

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[2] Insulation Contractors of Southern California, Inc., 110 NLRB 638, and cases cited.

The aggregate dollar volume of construction work performed by members of the Tacoma Chapter in 1955 in each of the three categories set forth above for members of the Seattle Chapter amounted to approximately one-third of the dollar volume of work performed by members of the Seattle Chapter in each such category. At the time of the hearing in this proceeding, a member of the Mountain Pacific Chapter was engaged in construction work on installations directly related to the national defense, and located outside of the State of Washington, under a contract with the United States Government providing for the payment of $6,000,000 for the work required by the agreement.[3]

In sum, members of the AGC Chapters have been, at all times material to this proceeding, engaged in interstate commerce within the meaning of the Act; the operations of the AGC Chapters and their members have affected, and affect, such commerce;[4] the Board has jurisdiction over this proceeding; and the assertion of its jurisdiction will effectuate the policies of the Act.

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[3] The record contains additional evidence that members of the Mountain Pacific Chapter engage in operations affecting interstate commerce of sufficient scope to meet criteria promulgated by the Board for the exercise of its jurisdiction. It is unnecessary to deal with such evidence, since the figures given above amply warrant the assertion by the Board of jurisdiction over this proceeding.

[4] Maytag Aircraft Corporation, 110 NLRB 594; Insulation Contractors of Southern California, Inc., supra; and Jonesboro Grain Drying Cooperative, 110 NLRB 481.

II. The labor organizations involved

The District Council is comprised of various local unions, including Local 242, affiliated with the International Hodcarriers, Building and Common Laborers of America, AFL-CIO (also referred to below as the International). The District Council, on behalf of Local 242 and other affiliates of the International, has negotiated and entered into collective bargaining agreements with the AGC Chapters, prescribing wages, hours of employment, and other working conditions of employees of members of the Chapters. One such agreement, to which additional reference will be made later, is currently in effect. Local 242 admits to membership employees of members of the Chapters and represents such employees for the purposes of collective bargaining. Both the District Council and Local 242 are labor organizations within the meaning of Section 2 (5) of the Act.

III. The alleged unfair labor practices

A. Prefatory statement

On December 30, 1955, the AGC Chapters, "acting for and on behalf of their members," jointly entered into an agreement with the District Council, prescribing wages, hours of employment, and other working conditions of individuals employed by members of the Chapters. The District Council negotiated and entered into the contract for and on behalf of various affiliates of the International, including Local 242. By its terms, the agreement became effective on January 1, 1956, and is to remain

in effect (subject to various provisions for modification not relevant here) until at least December 31, 1958.

One of the issues in this proceeding focuses upon the legality of Section 6 of the contract, which provides:

6. To maintain employment, to preserve workable labor relations, to proceed with private and public work, the following accepted prevailing practices shall continue to prevail in the hiring of workmen:

(a) The recruitment of employees shall be the responsibility of the Union[5] and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.

(b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.

(c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours, Saturdays, Sundays and holidays excluded, the Employer may procure workmen from other sources.

(d) Either party to this Agreement shall have

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[5] The term "Union", as used in the agreement, refers to the District Council and the local unions to which the contract is applicable. In that connection, see the opening paragraph of the agreement (G. C. Exh. 4).

the right to reopen negotiations pertaining to Union security by giving the other party thirty (30) days written notice, when there is reason to believe that the laws pertaining thereto have been changed by Congressional Amendments, Court Decisions, or governmental regulations.

The membership of Local 242 consists of approximately 1700 building and common laborers and some 70 hod carriers. Since the execution of the agreement with the AGC Chapters, as well as for many years prior thereto, Local 242 has maintained a hiring hall at its office in Seattle for the purpose of dispatching laborers and hod carriers to jobs at the request of employers engaged in the construction industry within the territorial jurisdiction of the union. Members of Local 242 seeking dispatch as laborers sign a registry book maintained by the union at its office, are given a number, and are usually sent to jobs by the organization's dispatcher in numerical rotation, unless an employer requests the assignment of a specific individual, in which event, the workman so requested is sent to the job involved. Laborers who are not members may also register, but they place their names in a different part of the registry book and are dispatched in numerical rotation only after all available members who hold registry numbers have been dispatched. Local 242 has no systematized procedure for dispatching hod carriers. No registry is maintained for them. In some cases, the dispatcher assigns an available hod carrier because he has been out of work longer than others; in other situations, those

awaiting assignment at the office decide among themselves who is to be dispatched. Generally, if an available hod carrier wishes it, he will be chosen for dispatch to a job with a contractor for whom he has worked before, and, as in the case of laborers, the union will dispatch a hod carrier member to a job, without regard to other factors, if an employer requests the assignment of the individual. Local 242 has had occasion to dispatch hod carriers who are not members of the organization, but the practice has been to do so only on occasions when no members are available for dispatch. In connection with the hiring hall practices described above, it may be noted that the dispatcher is obligated, under the terms of the International's constitution, to do all in his "power to procure employment for such brothers (members) as may desire situations in preference to any and all non-union men."

Cyrus Lewis, the charging party in this proceeding, has been a hod carrier by occupation for about 20 years. He became a member of Local 242 in 1943; was subsequently suspended at one point or another for non-payment of dues; was reinstated in 1947; was suspended again in or about 1949 for non-payment of dues; and was dropped from membership at some point thereafter in 1949 or 1950. He was unable to work as a hod carrier much of the time during the next few years because of physical disability, but from time to time when he felt able to work, he sought dispatch as a hod carrier at the union's hiring hall. On these occasions, the union declined to dispatch him.

Lewis' physical condition improved early in 1956,[6] and on or about March 15 of that year, he came to the hiring hall and asked Leo Allman, the union's corresponding secretary and dispatcher, and Robert Buchanan, the organization's financial secretary and business representative, to dispatch him to a job. Both Allman and Buchanan told him that no work was available. Lewis sought work at the hiring hall two or three times each week during the next seven or eight weeks, and met with the same result, both Allman and Buchanan telling him repeatedly that there was no work. Because of climatic and related factors, the period was a slack season for hod carriers (as is the spring of each year until about the middle of May). However, notwithstanding the season and the statements made to Lewis to the effect that no work was available, hod carriers were dispatched to jobs from the union's hiring hall, some repeatedly, on a substantial number of occasions during the months of March, April and May 1956, while Lewis was at the union's office seeking, and failing, to secure dispatch. Contrary to a claim advanced by Allman in his testimony, the evidence does not credibly establish that the hod carriers dispatched were specifically requested by the employers to whose projects they were sent.[7]

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[6] Unless otherwise stated, all events described below took place in 1956.

[7] Allman stated that as far as he could recall, the only hod carriers dispatched during the slack season prior to May 17 were those who were specifically requested by contractors. However, he later contra-

During the spring of 1956, Lewis made a number of efforts to secure reinstatement to membership in Local 242, while he was at the union's hiring hall seeking work. Thus on April 3, he told Buchanan that he wished to become a member of the union, and offered to "pay some dues." Buchanan suggested that Lewis discuss his request with Allman. Lewis did so, and Allman stated that he would take no money from Lewis, that "there weren't any jobs," and that he "wouldn't take any new members." Buchanan took substantially the same position as Allman on a number of other occasions when Lewis told Buchanan that he wished to be reinstated to membership.

On the morning of May 9, 1956, while on his way home from an unsuccessful quest for work at the hiring hall, Lewis secured employment for the balance of the day from a man named Albert Nielsen in connection with the moving of a building. Niel-

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dicted himself on that score, and at still another point stated that he could not remember whether, during the period in question, the only hod carriers dispatched were those who were specifically requested by contractors. Moreover, at various points, tangential or unresponsive answers by Allman persuaded me that he was being evasive. In some instances, Allman made no response to questions put to him, and, upon appraisal of his demeanor, it appeared to me that this was attributable to a desire by him to avoid answering rather than to a lack of understanding of the questions involved. In contrast, Lewis impressed me as a credible witness, and I have thus based findings herein on Lewis' testimony with respect to what he observed at the hiring hall and his conversations and transactions with Allman.

sen, who is engaged in the business of moving buildings, is not a member of any of the AGC Chapters. Shortly before quitting time that day, Buchanan appeared at the project, and observing that Lewis was employed there, told Nielsen that he would place a picket line at the project unless Nielsen hired only union members for the work in progress there. Lewis continued to work the short period remaining until quitting time and was then paid off by Nielsen who had planned to employ Lewis at the project only for the day.

On May 14, Lewis went to the office of Local 242 and asked Allman to dispatch him to a job. Allman replied that he had heard that Lewis had filed a charge against Local 242; that the union was not going to give Lewis "a damned thing"; and that the latter was to "get out and stay out." Lewis reported the incident later that day to a field examiner stationed in the Seattle regional office of the Board. The field examiner thereupon telephoned Buchanan. During the course of the conversation, Buchanan suggested that the field examiner tell Lewis to come to the office of Local 242 and inform the union whether he desired dispatch as a hod carrier or a common laborer. (The record does not establish what, if anything, else was said.)

Lewis visited the hiring hall on the morning of the following day and asked Allman to dispatch him. Allman replied that no work was available, but stated that he might be able to send Lewis to a job later that day if one turned up, and that Lewis should "stick around." That morning, also,

Buchanan asked Lewis if he wished "to take out a number as a common laborer," and Lewis replied that he preferred to be dispatched to a hod carrier's job. Lewis was not dispatched on that day, nor on the following day when he came to the hiring hall and asked Allman for a job.

Lewis came to the hiring hall again on May 17, arriving there at about 6:45 a.m. He was the first hod carrier there. Some four or five hod carriers arrived about 15 minutes later. These were dispatched first during the course of the morning, although Lewis stationed himself at the dispatcher's window as soon as Allman arrived. After dispatch of the others, Lewis continued to wait for some time at the union's office. At about 10:30 a.m., Lewis became aware that Allman required a hod carrier for dispatch "for some brick job" at an establishment described in the record as Todd's Shipyard. Lewis, who was then the only available hod carrier at the hiring hall, approached Allman and told him that he wished to be dispatched to the job. Allman said that the job was not one for a hod carrier and that the opening was not at the shipyard. Shortly thereafter, a hod carrier came into the union office, and Allman dispatched him to the shipyard. At one point or another that morning, after various hod carriers had been dispatched, Lewis telephoned the field examiner mentioned above and reported that he had not been dispatched and that he had been given no job assignment. The field examiner thereupon called the hiring hall and, talking either to Buchanan or Allman, told one or the other that he

had been informed that Lewis "was not being sent out." Shortly after the call, Allman, stating that he would dispatch Lewis, told the latter that he wanted him to withdraw the charge. Lewis replied that he would see what he could do in that regard, and Allman thereupon dispatched him to a job which lasted a few days.

On May 23, having completed the work to which he had been dispatched, Lewis presented himself at the hiring hall and asked Allman for another dispatch. The latter inquired of Lewis whether he had withdrawn the charge, and upon receiving a negative reply, remarked to Buchanan who was present that "Lewis didn't do what we told him to do." Buchanan said, "* * * the hell with him," and then Allman told Lewis: "You didn't go down and withdraw the charge like I told you to so you can get out and stay out as far as I am concerned."

Nevertheless, Lewis came to the hiring hall on the following day and asked Allman to dispatch him. Allman refused, stating that he had previously dispatched Lewis on the assumption that the latter would withdraw the charge, and that Lewis would not be dispatched again until he withdrew it. During the next several weeks, Lewis repeatedly went to the hiring hall seeking dispatch, but he was unsuccessful. Allman told him on these occasions that no work was available. On June 13, however, Allman dispatched him to a job which lasted for about a week.

On June 21, after completion of that job, Lewis made a request of Allman that he be admitted to

membership in Local 242, offering to pay what he understood to be the required initiation fee. (Lewis had heard that the fee was $37.50, and he had enough funds on his person to pay that sum.) Allman's reply to the offer was that he would not take any money from Lewis "until I get a statement from the Board that you have withdrawn the case."

Several weeks later, on July 11, Allman dispatched Lewis to a job which lasted until August 6. On August 8, Lewis asked Allman for another dispatch, and repeated his offer "to pay some money" toward admission to membership in the union. Allman again rejected the offer, asserting that he would take no money from Lewis until he received a letter from the Board stating "that the case had been dropped." Lewis, however, continued to return to the hiring hall for dispatch, and was sent to a job by Allman some days later. Since then he has been securing work through the hiring hall with substantial regularity.

On August 18, Lewis made another attempt to become a member of Local 242, broaching the subject to Allman at the dispatch window in the hiring hall. This time, unlike the previous occasions, Allman invited Lewis into the office behind the window for a discussion of the matter. The dispatcher again declined to take any money from Lewis, but said that he would give Lewis a "slip as good as a (union membership) book," and that the slip would be valid until the following September 18. Allman thereupon signed and gave Lewis a printed form bearing the caption "Official Receipt," and contain-

ing an entry signifying that it was to be valid until September 18. (From the material printed on the form, it is evident that the union uses slips of this type to acknowledge payment of initiation fees and dues by its members.) Lewis remarked that "my business here is to pay some money," and asked Allman whether he would be required to pay any sum for the slip. The dispatcher assured him that he would not "have to pay a nickel."

During the following week, Lewis worked at a project to which Allman had dispatched him. Some time during the course of the week, Allman visited him at the project, and asked him whether he had withdrawn the charge. Lewis replied that he had discussed the subject with the Seattle regional office of the Board and had been informed there that the matter was out of his hands, and that the charge would not be dismissed.

Allman made another effort to persuade Lewis to withdraw the charge shortly after the expiration date of the "Official Receipt," visiting Lewis for that purpose at another project where the latter was employed. In the course of the discussion, Allman told Lewis that "other cases had been filed against the union"; that "we have given the boys work and they have withdrawn the cases"; and that he had come to the project to "see if you would withdraw the case, if you want to keep working." The dispatcher asked Lewis whether he would "sign a paper" stating that he wished to withdraw the charge, in order to "prove" that he had "tried to withdraw" it. Lewis replied that he had been told

at the regional office that the matter was out of his hands; that he preferred that Allman "call up and talk to some officials up there"; and that there was nothing else that he could do about the matter.

B. Concluding findings

The General Counsel contends that Section 6 of the agreement described above contains provisions that are invalid per se. In that regard, it is alleged in the complaint that "by continuing (the agreement) in effect,"[8] the AGC Chapters have been interfering with, restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8 (a) (1) of the statute; and the District Council and Local 242 have been causing employer members of the Chapters to discriminate in violation of Section 8 (a) (3) of the Act, thereby violating Sections 8 (b) (2) and 8 (b) (1) (A) of the Act.[9] As the

[8] The complaint does not allege the execution of the agreement, as distinguished from its maintenance, as a violation of the Act. So far as the District Council and the AGC Chapters are concerned, such an allegation is barred by Section 10 (b) of the Act, since the agreement was executed more than six months prior to the filing of the respective charges against these Respondents.

[9] The complaint does not charge that by maintaining Section 6 of the agreement, the Chapters discriminated in violation of Section 8 (a) (3) of the Act (see Par. XI of the complaint), although it alleges that by maintaining the relevant contract provisions, the District Council and Local 242 have caused members of the Chapters to discriminate in violation of Section 8 (a) (3).

General Counsel asserts that the contract terms in question are unlawful per se, the validity of the claim must be tested by reference to the relevant language alone, and without regard to the contention, also advanced by the General Counsel, that members of the AGC Chapters have actually discriminated "with respect to the hire of Lewis," and that Local 242 caused such discrimination. The claim of actual discrimination against Lewis, and the question of the responsibility therefor of Local 242, will be separately considered at another point below.

For support of his position concerning Section 6 of the agreement, the General Counsel relies upon Pacific Intermountain Express Company, 107 NLRB 838, enforced as modified, 225 F. 2d 343 (C.A. 8). [10] There the Board considered the legality of certain seniority provisions of two collective bargaining contracts, one made in 1949 and the other in 1952. The relevant language of the first provided that "any controversy over the seniority standing of any employees on this list shall be referred to the Union for settlement." The later agreement contained the same language, but provided, in addition, that "such determination shall be made without regard to whether the employees

[10] The General Counsel also cites and relies upon the later case of North East Texas Motor Lines, Inc., et als., 109 NLRB 1147, enforced as modified, 228 F. 2d 702 (C.A. 5). In that case, the Board held invalid contractual provisions substantially similar to those involved in the Pacific Intermountain Express case.

involved are members or not members of the Union." Overruling a contrary position taken by it in an earlier case (Firestone Tire and Rubber Company, 93 NLRB 981), the Board held the delegation to the union of "complete control over the determination of seniority" to be unlawful per se, and that as a result of agreeing to, and maintaining, the relevant contract provisions, the employer involved had violated Sections 8 (a) (1) and 8 (a) (3), and the union Sections 8 (b) (1) (A) and 8 (b) (2). The Board stated the reasons for its holding as follows (p. 845):

The objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and that information is, as a rule, peculiarly within the knowledge of the employer. Indeed, the area in which the union is likely to be more informed than the employer with respect to the employer's employees is that pertaining to employees' union membership or to the employees' compliance with the union's constitution, bylaws, or other regulations—subjects, however, which obviously are not relevant considerations in the implementation of a seniority provision. We can therefore see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a nondiscriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union

to encourage membership in the union. Accordingly, the inclusion of a bare provision, like that in the 1949 contract, that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union. And because we believe that it will similarly tend to encourage membership in the union, we also conclude that, the inclusion of a statement, like that in the 1952 contract, that seniority will be determined without regard to union membership is not by itself enough to cure the vice of giving to the union complete control over the settlement of a "controversy" with respect to seniority.

From his reliance upon the Pacific Intermountain Express case, it is evident that the General Counsel analogizes the delegation to a union, by contract, of "complete control" over the resolution of seniority questions to contractual provisions, such as those involved here, which vest in a union the exclusive responsibility for the recruitment of qualified workmen subject only to the qualification that if the union cannot supply such labor within 48 hours after a request therefor, the employer may procure it from other sources. The analogy, however, does not survive scrutiny of the underlying reasons for the Board's holding in the Pacific Intermountain Express case.

In arriving at its result, the Board pointed out that "the objective standards relevant to a determination of seniority generally derive from the employment history of the employees involved, and

that information, is as a rule, peculiarly within the knowledge of the employer"; and that matters, such as those related to union membership, upon which the union is likely to be more informed than an employer, "are not relevant considerations to the implementation of a seniority provision." From these factors, the Board "presumed" that the delegation involved in the cited case was "intended to, and in fact (would), be used by the union to encourage membership in the union," and held the relevant provision in each contract to be "violative of the Act because it tends to encourage membership in the union."

However, the factors which led to the Board's presumption are not present here. It is common knowledge that the union hiring hall is a traditional feature of many industries, including the building trades,[11] and that its use as a source of supply of labor long antedated the passage of the Act. In that regard, it may be noted that the hiring hall maintained by Local 242 has been in existence for more than 30 years. It is also a matter of common knowledge that in many industries, employers look to, and rely upon, union hiring halls as convenient and necessary vehicles for the recruitment of labor.

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[11] Contractual provisions relating to union hiring halls, and the validity of their application, have been considered by the Board in many cases. See, among others, for example, American Pipe and Steel Corporation, 93 NLRB 54; Pacific American Shipowners Association, 90 NLRB 1099; Waterfront Employers of Washington, 98 NLRB 284; and Pacific Coast Marine Firemen, etc., 107 NLRB 593.

As the evidence in this proceeding establishes, this is true of members of the AGC Chapters. (See, in that connection, the testimony of Wilbur H. Landaas.) Moreover a union hiring hall also serves as a central point where workmen may make known their job necessities and secure employment, relieving them of the need for an expenditure of time, energy and money in a search for work at dispersed places. From what has been said, it is evident that, unlike the data generally needed to resolve questions of seniority, information concerning the availability of individuals for employment is frequently, to say the least, "peculiarly within the knowledge" of the union rather than of employers seeking workmen; and that such information may serve the convenience and needs of employers and employees alike. Bearing in mind such factors of industrial and economic convenience and necessity, I can see no basis for a presumption that a "bare provision" delegating to a union the responsibility for the recruitment of labor in the terms expressed in Section 6 "is intended to, and in fact will, be used" to encourage union membership. One could with at least equal logic, I think, presume that the purpose of such a provision, standing above, is to meet the industrial and economic convenience and necessities of employers and those seeking employment. Upon close scrutiny of the General Counsel's position, what it implies is that one should indulge a presumption from the naked provisions of Section 6, alone, that the parties thereto intend to, and will, use them for unlawful purposes, despite the

fact that they may also be used for the lawful purpose of furnishing employers with an advantageous source for the supply of labor, and jobseekers with a convenient method of securing work. The adoption of such a doctrine would, in my judgment, run counter to traditional and elementary legal concepts.

What is more, there are authorities that are more to the point than the Pacific Intermountain Express case. In Pacific American Shipowners Association, 90 NLRB 1099, the Board considered the legality of a contract proposal that "all unlicensed personnel" be secured through a union's hiring hall. The proposal included a prohibition against discrimination on the basis of union membership. The Board held that the proposal was not unlawful, pointing out that "the provision contained in the proposal that personnel be secured through the offices of the Respondent (the union) does not, on its face, require discrimination because of union affiliation" (ibid. p. 1101). The case of Pacific Marine Firemen, etc., 107 NLRB 593, decided a few weeks before the Pacific Intermountain Express case, also involved a contract provision requiring employers to secure all personnel in various classifications "from and through the offices" of a labor organization, and prohibiting discrimination because of membership or non-membership in the union. While the Board did not expressly pass upon the legality of the agreement, there is a clear implication in its decision that it proceeded upon the assumption that the contract was lawful, for in connection with the remedy it formulated

relating to a discriminatory application of the union's hiring hall, it went so far as to provide that the union's "obligation to maintain a nondiscriminatory hiring hall shall be limited to such times as it acts as the exclusive source of supply of the personnel * * *" (ibid. p. 594, n. 2). To be sure, the provisions in both cases, in contrast to Section 6, contained express prohibitions against discrimination on the basis of union membership. But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination. In that regard, it may be noted that the Board in the Pacific American Shipowners case appears to have considered the statement of such a prohibition as an added, rather than the controlling, reason for its conclusion that the hiring provision there involved was not unlawful. The sum of the matter is that the long standing precedent of the Pacific American Shipowners decision is applicable here, and that the distinguishable holding of the Pacific Intermountain Express case is inapposite. Hence, I do not agree that the provisions of Section 6 of the agreement between the AGC Chapters and the District Council are invalid per se, and I find that by the mere fact of "continuing (the agreement) in effect," the Respondents have not violated any of the provisions of the Act.[12]

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[12] Trial Examiner Martin S. Bennett recently held to the contrary in a case involving the same contractual provisions, the AGC Chapters, the Dis-

As noted earlier, apart from his claim that Section 6 of the contract contains provisions that are invalid per se, the General Counsel contends that in applying these provisions, Local 242 caused members of the AGC Chapters to discriminate against Lewis in violation of Section 8 (a) (3) in that the union failed and refused to dispatch him for employment by members of the Chapters because he was not a member of the organization. Preliminary to a resolution of the issue, it may be noted that the General Counsel advances no claim that Local 242 caused Nielsen (who is not a member of any of the Chapters) to discriminate against Lewis. Nor does the complaint include an allegation that Local 242 caused Todd's Shipyard to discriminate against Lewis.) (There is no evidence that the firm is a member of any of the Chapters.)[13] However, Buchanan's conversation with Nielsen, and Allman's failure to dispatch Lewis to Todd's Shipyard, are relevant to the question whether Local 242 has maintained a discriminatory policy of giving preferment in dispatch at its hiring hall to union members over those who are not members, and whether that policy has been applied to Lewis.

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trict Council, and a local affiliate of the latter. See Mountain Pacific, Seattle, and Tacoma Chapters of the Associated General Contractors of America, Inc., et als., Case Nos. 19-CA-1276 and 19-CB-392. That proceeding is now pending before the Board on exceptions.

[13] It may be observed in passing, also, that no evidence was offered that either Nielsen or Todd's Shipyard is engaged in interstate commerce or in operations affecting such commerce.

In that regard, Allman gave testimony to the effect that he never discriminated in dispatching Lewis on the basis of the latter's lack of membership in Local 242, asserting also that on the occasion when Lewis was sent to a job on May 17, he was dispatched to "about the first" opening to become available for a hod carrier at the hiring hall in the spring of 1956. I do not credit this testimony.[14] The evidence establishes, as Buchanan in effect conceded, that it is the union's policy to give preference in dispatch to its members. What is more, as Allman admitted, he is bound by the terms of an obligation he has taken, as an incident of the office he holds, to do all in his "power to procure employment for such brothers as may desire situations to any and all non-union men." I have no doubt that Allman repeatedly applied this policy to Lewis prior to the latter's dispatch on May

[14] Nor do I credit Allman's claim that he rejected Lewis' request for dispatch to the Todd job on May 17 because, according to Allman, the job required a man of smaller physical proportions than Lewis. When Lewis asked for the job, Allman gave no such reason for declining to dispatch him. Moreover, Lewis' undisputed version of his conversation with Allman on the occasion in question is that Allman told him that the job opening available was not at the shipyard. It may also be noted that in a written statement given to a representative of the General Counsel, Allman denied dispatching any hod carrier to Todd's Shipyard on May 17. Because of the foregoing, as well as other infirmities in Allman's testimony, I am persuaded that the reason he now advances for refusing to dispatch Lewis to the shipyard is an afterthought.

17 and referred union members to jobs in preference to Lewis because the latter was not a member of Local 242. Moreover, it is clear that Allman applied a carrot-and-stick procedure to Lewis to coerce him into withdrawing the charge he had filed against Local 242, refusing to dispatch Lewis on May 14 because he had filed the charge; then a few days later dispatching him in order to induce him to withdraw it; thereafter resorting to a policy of refusing to dispatch Lewis, and of rejecting his offers to become a member, because he had not withdrawn the charge; later furnishing Lewis with the "Official Receipt," obviously with a view to inducing him to drop the charge; and finally visiting Lewis at a project where he was at work and soliciting him to sign a paper that he wished to drop the charge, while intimating to Lewis that he would not be dispatched again unless the charge were withdrawn.

Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC Chapters (or, for that matter, any other employer) discriminated "with respect to the hire of Lewis," as the complaint alleges, and that Local 242 caused such discrimination, within the meaning of the Act. The heart of the matter is that there is no evidence in the record that any member of any of the AGC Chapters sought or requisitioned any labor at or through the office of Local 242 at any time since the effective date of the contract. Moral convictions that such requisitions were made will

not suffice, for they are no substitute for evidence.

However, the General Counsel takes the position in his brief, as he did, in effect, at the hearing, that "the determination of the extent of the discrimination" is a matter for the compliance stage of the proceeding. As support for his position, the General Counsel cites International Union of Operating Engineers, Local No. 12, 113 NLRB 655, recently enforced as modified, 38 LRRM 2776 (C.A. 9). That case is inapposite, for the Board made express findings that the employers there involved actually requisitioned labor from a hiring hall maintained by a union under the terms of a collective bargaining agreement (113 NLRB 655, 659). With that as a background, the Board found that the union had discriminated against a given individual in job referrals from the hiring hall, and concluded that the extent to which he "was injured by the unlawful system of preferences" could "properly be settled in the compliance stage of the proceeding" (ibid. p. 663). The General Counsel's position, and his reliance upon the cited case, beg the question, for what is at issue here is not "the determination of the extent of the discrimination," but whether the evidence will support a finding of discrimination, whatever its extent, by members of the AGC Chapters. The underlying theory of the General Counsel's case is that by force of Section 6 of the agreement, the Chapters, as agents for their members, delegated to the District Council and its affiliates, including Local 242, the responsibility for dispatching workmen for em-

ployment by such members, and that in the exercise of the authority delegated to it, Local 242 caused members of the Chapters to discriminate against Lewis. There is no doubt, as pointed out earlier, that Local 242 discriminated against Lewis, but there can be no finding that it discriminatorily exercised the authority delegated to it by members of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242, the agency through which Lewis sought job referrals. The critical fact is that there is no such evidence, and however one may condemn the treatment accorded Lewis by Local 242, and desire to do him moral justice, one must not blind himself to deficiencies in the evidence.[15]

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[15] In the course of a discussion of the state of the record, the General Counsel made the observation at the hearing that Local 242 "kept no records of these incoming requisitions for hod carriers." Without deciding or implying that the state of the union's records has a material effect upon the issue at hand, it may be noted in passing that there is no proof that Local 242 keeps no records of such "incoming requisitions," although there is evidence that it maintains no registry for hod carriers seeking job referrals. Moreover, it does not appear that members of the AGC Chapters keep no records of such requisitions for labor as they may have occasion to submit to unions or that such members are unable to give evidence on the subject of requisitions submitted to Local 242. The General Counsel has apparently chosen to submit the case upon the theory that evidence of such requisitions is unnecessary to support a finding that

For the reasons stated above, I shall recommend that the complaint be dismissed in its entirety with respect to the AGC Chapters and the District Council, and that so much of it be dismissed as alleges that Local 242 caused members of the Chapters to discriminate against Lewis.

I reach a different result, however, in connection with the coercive efforts of Local 242 to induce Lewis to withdraw the charge he filed against that organization. The absence of evidence that the hiring hall maintained by Local 242 has been used by any members of the Chapters does not negate the fact that the maintenance of the hall was in effect embraced within the terms of a contract made between the District Council, on behalf of Local 242 and other unions, and organizations of employers whose operations affect commerce within the meaning of the Act, and that Local 242 used the hall as a means of coercing Lewis. The several threats made to Lewis that he would not be dispatched unless he withdrew the charge embraced the implication that he would not be referred to jobs upon any requisitions submitted by members of the Chapters under the terms of Section 6 of the contract. Accordingly, I find that as a result of each instance, described above, when Lewis was dispatched in order to induce him to withdraw the charge, and of each occasion, outlined above, when Local 242, whether through Buchanan or Allman

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members of the AGC Chapters have discriminated against Lewis, and that Local 242 has caused such discrimination.

or both, told Lewis in effect that he would not be dispatched or given employment through the hiring hall because he had filed the charge or that he would not be dispatched or given employment through the hiring hall unless the charge were withdrawn, Local 242 restrained and coerced Lewis in the exercise of rights guaranteed him by Section 7 of the Act, and thereby violated Section 8 (b) (1) (A) of the statute.[16]

IV. The effect of the unfair labor practices upon commerce

The unfair labor practices of Local 242 set forth in Section III, above, occurring in connection with the operations of the AGC Chapters described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Local 242 has violated Section 8 (b) (1) (A) of the Act, I shall recommend below that the said Local 242 cease and desist from its unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and on the entire record in this proceeding, I make the following:

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[16] D. D. Bean & Sons., 79 NLRB 724 (and cases cited at p. 725, n. 6).

Conclusions of Law

1. The AGC Chapters are, and each of them is, an employer within the meaning of Section 2 (2) of the Act.

2. The District Council and Local 242 are, respectively, labor organizations within the meaning of Section 2 (5) of the Act.

3. By restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, Local 242 has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dispatching or referring to any job or employment any employee or individual seeking dispatch or referral to any job or employment, or promising or offering to dispatch or refer any such employee or individual to such job or em-

ployment, for the purpose of persuading or inducing any such employee or individual to withdraw or abandon a charge filed with the National Labor Relations Board, or upon condition that such a charge be withdrawn or abandoned;

(b) Threatening, or otherwise informing, any such employee or individual that he will not be dispatched or referred to any job or employment, or that he is being, or will be, denied any job or employment opportunity, because he has filed a charge with the National Labor Relations Board, or unless he withdraws, or promises or undertakes to withdraw or abandon, such a charge; and

(c) In any other manner restraining or coercing employees or individuals seeking dispatch or referral to any job or employment in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.[17]

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[17] The course of conduct of Local 242 toward Lewis vitally affected his opportunities to earn a living. This type of behavior strikes at the heart of rights guaranteed employees by Section 7 of the Act, and manifests a disposition by Local 242

2. Take the following affirmative action which, I find, will effectuate the policies of the Act:

(a) Post in conspicuous places at its usual membership meeting place and office in Seattle, including places where individuals come to it for the purpose of seeking dispatch or referral to jobs or employment, and where notices to such individuals and members are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the Nineteenth Region of the Board, shall, after being signed by a duly authorized representative of said Local 242, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material; and

(b) Notify the said Regional Director, in writ-

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to thwart the exercise of all such rights as it may think its interests require. The guarantees set forth in Section 7 are interdependent, and the violations found above are related to other unfair labor practices proscribed by the Act. In view of the conduct of Local 242, it may be reasonably be anticipated that it will commit such other unfair labor practices in the future unless appropriately restrained. For that reason, and in order to make effective the interdependent guarantees of Section 7, I am of the opinion that the Board's order should embrace the terms set forth above. See N.L.R.B. v. Entwhistle Mfg. Co., 120 F. 2d 532 (C.A. 4); May Department Stores v. N.L.R.B., 326 U.S. 376.

ing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply with the foregoing recommendations applicable to it.

* * * * *

It is recommended that the complaint be dismissed in its entirety with respect to the District Council and the AGC Chapters.

It is further recommended that so much of the complaint be dismissed as alleges that Local 242 violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act by causing members of the AGC Chapters to discriminate in violation of Section 8 (a) (3) of the Act.

It is further recommended that, unless on or before 20 days from the receipt of this Intermediate Report and Recommended Order, Local 242 notify the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the said Local 242 to take the actions required of it above.

Dated this 11th day of December, 1956.

/s/ HERMAN MARX,
Trial Examiner.

APPENDIX A

Notice To Our Members and All Individuals Seeking Dispatch or Referral To Jobs By This Organization Pursuant To The Recommendations of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members and all individuals seeking dispatch or referral to jobs by us that:

We Will Not dispatch or refer to any job or employment any employee or individual seeking dispatch or referral to any job or employment, or promise or offer to dispatch or refer any such employee or individual to any such job or employment, for the purpose of persuading or inducing any such employee or individual to withdraw or abandon a charge filed with the National Labor Relations Board, or upon condition that such a charge be withdrawn or abandoned.

We Will Not threaten, or otherwise inform, any such employee or individual that he will not be dispatched or referred to any job or employment, or that he is being, or will be, denied any job or employment opportunity, because he has filed a charge with the National Labor Relations Board, or unless he withdraws, or promises or undertakes to withdraw or abandon, such a charge.

We Will Not in any other manner restrain or coerce employees or individuals seeking dispatch or referral to any job or employment in the exer-

cise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO,

(Labor Organization.)

Dated .....

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

119 NLRB No. 126 D-841

Seattle, Wash.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-1374—Mountain Pacific Chapter of the Associated General Contractors, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter,

and

Case No. 19-CB-424 — International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO,

and

Case No. 19-CB-445—Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO,

and

Cyrus Lewis, Charging Party.

DECISION AND ORDER

On December 11, 1956, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Local 242 had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial

Examiner also recommended that the complaint be dismissed as to all other Respondents. Thereafter the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith, and as specifically indicated in an opinion which shall hereafter be issued.

(1) In the absence of any exceptions, we adopt the Trial Examiner's conclusion that the Respondent Union's threats and promises of benefits and inducements to charging party Lewis to get him to withdraw his charge in this case violated Section 8 (b) (1) (A) of the Act.

(2) In disagreement with the Trial Examiner and for reasons to be set forth in the opinion to issue hereafter, we conclude that the Respondent Employers have violated Section 8 (a) (3) and (1) of the Act, and the Respondent Unions have violated Section 8 (b) (2) and (1) (A) of the Act, by executing and maintaining in effect the hiring provisions of their contract.[1]

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[1] As only the charge against Respondent Local 242 was filed within six months of the execution of

(3) Also in disagreement with the Trial Examiner, we find that the implementation of the unlawful contract in the rejection of Lewis' continuous applications for employment was an unfair labor practice, and that the Respondent Unions thereby violated Section 8 (b) (2) and (1) (A) of the Act and the Respondent Employers thereby violated Section 8 (a) (3) and (1) of the Act.[2]

The Remedy

Having found that the Respondents, and each of them, have violated the Act, we shall order that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Respondents discriminated against Cyrus Lewis. The nature of the employment situation in this industry is such that no order of reinstatement is possible. Furthermore, as indicated above, this record does not specify the number of instances or the amounts of actual loss of employment by Lewis. Accordingly, the amounts of back pay due to him shall be computed in compliance proceedings. The back pay period shall begin March 15, 1956, when Lewis appeared at the

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the contract in question, our finding against the other Respondents is limited to the maintenance of the hiring provisions of the contract rather than their execution. Our remedial action herein is in no way affected by this difference.

[2] Member Murdock concurs in the finding of a violation with respect to Lewis for the reasons indicated in his attached opinion.

Unions' hiring hall in search of employment.[3] We shall order the various Respondents to notify Charging Party Lewis that they have no objection to his immediate employment.[4] The back pay liability of any Respondent shall be tolled 5 days after it serves such written notice on Charging Party Lewis. Back pay shall be computed in accordance with the formula stated in F. W. Woolworth Company, 90 NLRB 289.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondents Mountain Pacific Chapter of the Associated General Contractors, Inc.; The Associated General Contractors of America, Seattle Chapter, Inc.; and Associated General Contractors of America, Tacoma Chapter, and their officers, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the

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[3] As the Trial Examiner did not find that the Respondents discriminated against Lewis, the period from the date of the Intermediate Report to the date of the Order herein shall, in accordance with our usual practice, be excluded in computing the amount of back pay due him. Utah Construction Co., 95 NLRB 196.

[4] The Babcock & Wilcox Company, 110 NLRB 2116.

Respondent Unions or any other labor organization, which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by the Respondent Unions or any other labor organization, except as authorized by the proviso to Section 8 (a) (3) of the Act;

(2) In any like or related manner encouraging membership in the Respondent Unions, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act:

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Cyrus Lewis for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the Section herein entitled "The Remedy";

(2) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(3) Post at their offices, and at the offices of each employer member of the Respondents, in conspicu-

ous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix A.[5] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by representatives of Mountain Pacific, Seattle and Tacoma Chapters, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent Associations and their employer members to insure that said notices are not altered, defaced, or covered by any other material;

(4) Notify Cyrus Lewis and the Respondent Unions, in writing, that they have no objection to his employment, or to the employment of any other employees who are not members of the Respondent Unions or any other labor organization;

(5) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of issuance of the opinion herein, what steps they have taken to comply herewith.

II. The Respondents International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers,

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[5] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words, "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Building and Common Laborers Union of America, AFL-CIO, and their officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to provisions of any agreement with the Respondent Employers or with any other employer within the meaning of the Act, which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer upon clearance or approval by the Respondent Unions, except as authorized by the proviso to Section 8 (a) (3) of the Act;

(2) Causing or attempting to cause the Respondent Employers, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act;

(3) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act:

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Cyrus Lewis for any loss of pay he may have suffered by reason of the discrimination against him, as provided in the Section herein entitled "The Remedy";

(2) Notify Cyrus Lewis and the Respondent Em-

ployers, in writing, that they have no objection to his employment, or to the employment of any other employees who are not members of the Respondent Unions or any other labor organization;

(3) Post at their offices, in conspicuous places, including all places where notices to employees or prospective employees are customarily posted, copies of the notice attached hereto as Appendix B.[6] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by representatives of the Respondent Unions, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by them to insure that said notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of issuance of the opinion herein, what steps they have taken to comply herewith.

Dated, Washington, D. C., December 14, 1957.

BOYD LEEDOM, Chairman,
PHILIP RAY RODGERS, Member,
STEPHEN S. BEAN, Member,
JOSEPH ALTON JENKINS, Member,
[Seal] National Labor Relations Board.

[6] See footnote 18 above.

APPENDIX A

Notice to All Employees of and Applicants For Employment With Associated General Contractors of America, Inc., Mountain Pacific, Seattle, and Tacoma Chapters, and Their Constituent Members. Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not perform, maintain, or give effect to the provisions of any agreement with International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, Western Washington District Council, International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, or with any other labor organization, which unlawfully conditions the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by the aforementioned labor organizations, except as authorized by Section 8 (a) (3) of the Act.

We Will Not in any like or related manner encourage membership in the aforementioned labor organizations, or in any other labor organization, or otherwise interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

We Will make whole Cyrus Lewis for any loss

of pay suffered as a result of the discrimination against him.

All our employees and prospective employees are free to become, to remain, or to refrain from becoming, or remaining, members of the above-named Unions or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Mountain Pacific Chapter, The Associated General Contractors of America, Inc.

Dated .....

By .....
(Representative) (Title)

Seattle Chapter, The Associated General Contractors of America, Inc.

Dated .....

By .....
(Representative) (Title)

Tacoma Chapter, The Associated General Contractors of America, Inc.

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Employees of and Applicants For Employment with Associated General Contractors of America, Inc., Mountain Pacific, Seattle, and Tacoma Chapters, or Their Constituent Members, Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not perform, maintain, or give effect to the provisions of any agreement with Mountain Pacific Chapter, Seattle Chapter, or Tacoma Chapter, of The Associated General Contractors of America, Inc. or with any other employer, which unlawfully condition the hire of applicants for employment, or the retention of employees in employment with any employer, upon clearance or approval by any labor organization, except as authorized by Section 8 (a) (3) of the Act.

We Will Not cause or attempt to cause the above-named Employers or any other employer to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act.

We Will Not in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

We Will make whole Cyrus Lewis for any loss of pay suffered as a result of the discrimination against him.

International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO,

(Labor Organization.)

Dated .....

By .....

(Representative) (Title)

Western Washington District Council, International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO,

(Labor Organization.)

Dated .....

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Abe Murdock, Member, dissenting in part and concurring in part:

Contrary to the majority, the main issue in this case is not a threshold matter. For more than seven years it has been well established Board law, judicially approved in every Circuit Court of Appeals in which the issue was raised, that an exclusive nondiscriminatory hiring hall is not per se

unlawful.[6] Now for the first time, in a sweeping decision ignoring all Board and Court precedents, the majority holds that such a contract is unlawful. The importance and far reaching consequences of the majority's decision cannot, in my opinion, be overestimated. Nor only does it silently overrule all previous decisions of the Board, but it is contrary to decisions of the Ninth, Sixth, and Third Circuit Courts of Appeals.[7] I have in other decisions during the past year expressed my concern that the majority was apparently by-passing precedent in hiring hall cases.[8] What seemed implicit in those decisions is made explicit here. I do not believe that the legality of hiring halls can be decided today by a majority of this Board as though no other decision of the Board or of the courts existed in this area. The correct rule of law with regard to exclusive hiring halls, deriving from the Board's decisions in National Union of Marine Cooks and Stewards (Pacific American Shipowners Association), supra, and Hunkin-Conkey Construction Company, supra, can be found in decisions of three Circuit Courts of Appeals.

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[6] National Union of Marine Cooks and Stewards (Pacific American Shipowners Association) 90 NLRB 1099; Hunkin-Conkey Construction Company 95 NLRB 433. See, also, court decisions cited below.

[7] See decisions cited below.

[8] See my dissenting opinions in The Marley Company, 117 NLRB 107, at pages 115-122; Koppers Company, Inc., 117 NLRB 1863 at pages 1872-1877.

In Eichleay Corporation v. N.L.R.B., 206 F. 2d 799, 803, the Court of Appeals for the Third Circuit stated the principle as follows:

We agree with Eichleay that 'The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire only union members referred to the employer.' Del E. Webb Construction Co. v. N.L.R.B. 8 Cir., 1952, 196 F. 2d 841, 845. A referral system is not per se improper, absent evidence that the union unlawfully discriminated in supplying the company with personnel. N.L.R.B. vs. Swinerton, 9 Circ., 1953, 202 F. 2d 511; Hunkin-Conkey Construction Co., 95 N.L.R.B. 433 (1951).

In the Swinerton case, supra, at page 514, the Court of Appeals for the Ninth Circuit held that the burden of proving discrimination by the union in the administration of a referral system was on the General Counsel:

An employer violates Section 8 (a) (3) and (1) of the Act if he requires membership in a labor organization as a condition precedent—to employment. N.L.R.B. v. J. R. Cantrell Company, 201 F. 2d (C.A. 9). The Board has contended that adoption of a system of union referral or clearance also violates the Act absent 'guarantee that the union does not discriminate against non-members in the issuance of referrals.' We do not believe that National Union of Marine Cooks and Stewards 90 NLRB 1099 supports this view. Although it was there noted that the provisions of an applicable

labor contract prohibited such discrimination, the Board did not indicate that a referral system was per se improper absent a 'guarantee' of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized by the Board in Hunkin-Conkey Const. Co., 95 NLRB 433 where it was said that an agreement that hiring of employees be done only through a particular union office does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 NLRB at 435; Cf. Del E. Webb Const. Co. v. N.L.R.B., 196 F. 2d 841, 845." (Emphasis supplied.)

The doctrine of the above cases has been cited with approval by the Court of Appeals for the Sixth Circuit in N.L.R.B. v. F. H. McGraw & Co., 206 F. 2d 635, 640.

It should, it seems to me, be perfectly clear from the decided cases that the Union under this contract was not free to pick and choose on any basis it sees fit. The law requires that an exclusive hiring hall be administered in a nondiscriminatory manner. The real issue here is whether, as the Court of Appeals for the Ninth Circuit pointed out, the burden of proof on the question of discrimination will be shifted from the General Counsel to the Union administering a hiring hall. In the instant case the majority presumes that the Union

will administer an otherwise lawful contract in an unlawful manner. This presumption is made conclusive unless the contract includes "objective criteria" which will explain and justify "the exclusive aspect of hiring hall referrals." Only thereafter, I take it, will the burden of proof be shouldered by the General Counsel to establish that the Union nevertheless administered the contract in a discriminatory manner. But the Statute places the burden of proof squarely on the General Counsel to establish in every case that a respondent before this Board has engaged in an unfair labor practice. The majority, indeed, admits that the statute does permit an exclusive hiring hall, pointing to the salutary objective served by such institutions and a statement by Senator Taft that the closed shop provision of the Taft Hartley Act was not aimed at the hiring hall of the type administered in the maritime industry. But the majority would add something new to the law as understood by Senator Taft. The majority now says that a nondiscriminatory hiring hall, which the Board, the courts, and Senator Taft regarded as perfectly legal, "runs counter to the express proscription of the Statute" unless "objective" standards are included in the hiring hall contract. If the majority is right in the conclusion that mere exclusive referral by a union constitutes discrimination within the meaning of Section 8 (a) (3), then the Board, the courts, and Senator Taft must have been wrong. If a hiring hall results in unlawful discrimination because, as the majority finds, "the

Union is arbitrary master and is contractually guaranteed to remain so," I fail to see how the inclusion of "objective" criteria in the contract can remove the element of discrimination or the encouragement of union membership. Under any circumstances the employer would have surrendered "all hiring authority" and the Union would be free under the contract to refer or not to refer applicants regardless of any expressed "objective" criteria. I am as much concerned as is the majority that purported nondiscriminatory hiring halls be nondiscriminatory in fact. But I do not believe that this Board has the power to hold, on the one hand, that such conduct by a union and an employer is lawful but on the other hand, that it is unlawful unless the contract contains words indicating an intention by the union to administer the contract lawfully. This is as much as to say that an employer violates Section 8 (a) (3) of the Act merely by discharging a union member unless at the same time he states that the discharge is for economic reasons. My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership. Absent such proof, no unfair labor practice has been committed whether or not economic reasons were assigned by the employer for the discharge at the time it occurred. My view of the law in this respect is so well settled that it needs no citation of authority. In my opinion, the majority's novel approach to the hiring hall issue

amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation. To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred.

While the majority states that their decision "is not to be taken as outlawing all hiring hall arrangements," I must note that the requirement of "objective" criteria does not provide unions and employers with a precise test of a lawful contract. The majority holds that the standards for referral of applicants are "matters primarily for the employer and the union to negotiate and settle" so long as they fall within the majority's notion of "typical objective standards." But the majority is free in the very next case to hold that the union and employer have incorporated insufficient objective criteria or that the criteria adopted by the parties is not, in the majority's opinion, typical. Thus, wholly apart from the adverse impact of this decision on contracts which have been already made in good faith in accord with preexisting Board and Court law, the majority's decision means, in effect, that the parties to future collective bargaining agreements, faithfully following the majority's rule as to the type of provisions which they must include in their hiring hall contract, may neverthe-

less be found to have violated this Statute because they guessed wrong.

In my opinion the statement of Senator Taft, quoted in the majority's decision, is entirely accurate and directly supports existing Board and court precedents. The last sentence of the quoted statement is particularly applicable to the majority's conclusion that the presence of "objective criteria" in a hiring hall contract is indispensable to its legality. Neither the law [Taft Hartley Act] nor these decisions [Board and court decisions relating to hiring halls] forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union. (Emphasis supplied.) Nothing in Senator Taft's statement suggests or permits the conclusion that hiring halls without objective criteria are somehow evil and contrary to the Statute, but that hiring halls with such criteria are perfectly lawful as the majority finds. Senator Taft was in agreement with previous Board and court decisions to the effect that where the General Counsel had proved that an ostensible nondiscriminatory hiring hall was, in fact, operated as a closed shop or in an otherwise discriminatory manner, the practice was unlawful. I find myself entirely in accord with these precedents and Senator Taft.

I would therefore find that the contract in this case is not per se unlawful, but that the union's discriminatory practices under it are unlawful, including the coercion and discrimination as to Lewis. Mountain Pacific, Seattle, and Tacoma Chapters of the Associated General Contractors of America, Inc., 117 NLRB 1319.

Dated Washington, D. C., Dec. 14, 1957.

ABE MURDOCK, Member,
National Labor Relations Board

[Endorsed]: No. 15966. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner and Respondent, vs. Mountain Pacific Chapter of The Associated General Contractors, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter, International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, Respondents and Petitioners. Transcript of Record. Petition to Enforce and Petitions to Review Order of The National Labor Relations Board.

Filed: June 2, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15966

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC., THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER, INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO, and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended

(61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order dated December 14, 1957. The consolidated proceeding resulting in said order is known upon the records of the Board as Case Nos. 19-CA-1374, 19-CB-424 and 19-CB-445.

In support of this petition the Board respectfully shows:

(1) Respondents, Mountain Pacific Chapter of the Associated General Contractors, Inc., The Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter (hereinafter called Respondent Employers), are corporate associations of employers engaged in business in the State of Washington, and Respondents, International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO (hereinafter called Respondent Unions), are labor organizations engaged in promoting and protecting the interests of their members in said state, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on December 14, 1957,

duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Employers and their officers, agents, successors and assigns, and Respondent Unions, and their officers, representatives and agents. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent Employers and their officers, agents, successors and assigns and Re-

spondent Unions and their officers, representatives and agents, to comply therewith.

Dated at Washington, D. C. this 7th day of April, 1958.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel,
National Labor Relations Board.

[Endorsed]: Filed April 9, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER AND PETITION FOR REVIEW OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.

To the Honorable Judges of the Ninth Circuit Court of Appeals:

The Associated General Contractors of America, Seattle Chapter, Inc., hereby answers the petition for enforcement heretofore filed by the National Labor Relations Board, and petitions for a review by this court of the proceedings of the National Labor Relations Board and the order of said board in this matter.

Answering the allegations of the petition for enforcement, this respondent alleges:

1. This respondent, Associated General Contractors of America, Seattle Chapter, Inc., is a Washington corporation, functioning as a business

association to advance the common good of its members, and is not otherwise engaged in business. Its activities are carried on within the Ninth Circuit. Except as admitted herein, this respondent denies the allegations of paragraph 1 or denies that it has knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

2. Answering paragraph 2, this respondent admits the entry of an order by the National Labor Relations Board under date of December 14, 1957, and admits that the same was served upon it, but denies that said order was legal or valid.

3. This respondent has no knowledge as to the allegations of paragraph 3.

Petition For Review

This respondent petitions this court to review the order of the National Labor Relations Board in the consolidated cases, before designated cases Nos. 19-CA-1374; 19-CB-424, and 19-CB-445, insofar as said order was directed against this respondent.

1. This petition for review is made pursuant to the provisions of subparagraph (f) of Section 160, Title 29, United States Code.

2. This respondent alleges that the transcript which will be filed by the National Labor Relations Board in connection with its petition for enforcement will be the same transcript as would be involved in this petition for review.

3. The order of the National Labor Relations Board is invalid and erroneous for the following reasons:

This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not, and at no time material hereto was, an employer within the meaning of the National Labor Relations Act, nor was it engaged in commerce.

The procedure was not commenced within the time limited by law, particularly Section 10 (b) of the National Labor Relations Act.

It was not established that this respondent engaged in any unfair labor practice.

The findings of the National Labor Relations Board do not support the order which was entered against this respondent.

The order of the National Labor Relations Board is contrary to law.

Wherefore, this respondent prays that the order of the National Labor Relations Board be reviewed and set aside as to it, and that the petition for enforcement be denied.

LYCETTE, DIAMOND &
SYLVESTER,
By LYLE L. IVERSEN,
Attorneys for Associated General
Contractors of America, Seattle.

[Endorsed]: Filed April 22, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER AND PETITION FOR REVIEW OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO, WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO

To the Honorable Judges of the Ninth Circuit Court of Appeals:

The International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, hereby answer the petition for enforcement heretofore filed by the National Labor Relations Board, and petition for a review by this court of the proceedings of the National Labor Relations Board and the order of said board in this matter.

Answering the allegations of the petition for enforcement, these respondents allege:

1. These respondents admit that they are labor organizations engaged in promoting and protecting the interests of their members in the State of Washington within this judicial circuit. Except as admitted herein, these respondents deny the allegations of paragraph 1 or deny that they have

knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

2. Answering paragraph 2, these respondents admit the entry of an order by the National Labor Relations Board under date of December 14, 1957, and admit that the same was served upon them, but deny that said order was legal or valid.

3. These respondents have no knowledge as to the allegations of paragraph 3.

Petition For Review

These respondents petition this court to review the order of the National Labor Relations Board in the consolidated cases, before designated cases Nos. 19-CA-1374; 19-CB-424, and 19-CB-445, insofar as said order was directed against these respondents.

1. This petition for review is made pursuant to the provisions of subparagraph (f) of Section 160, Title 29, United States Code.

2. These respondents allege that the transcript, exhibits and decisions of the National Labor Relations Board, which is sought to be reviewed will necessarily be filed by the National Labor Relations Board in connection with its petition for enforcement and will be the same transcript as would be involved in this petition for review.

3. The order of the National Labor Relations Board is invalid and erroneous for the following reasons:

The procedure was not commenced within the time limited by law, particularly Section 10 (b) of the National Labor Relations Act.

It was not established that these respondents engaged in any unfair labor practice.

The findings of the National Labor Relations Board do not support the order which was entered against these respondents.

The order of the National Labor Relations Board is contrary to law.

Wherefore, these respondents pray that the order of the National Labor Relations Board be reviewed and set aside as to them, and that the petition for enforcement be denied.

/s/ L. PRESLEY GILL,

Attorney for International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, Western Washington District Council of International Hodcarriers, Building and Common Laborers of America, AFL-CIO.

[Endorsed]: Filed April 28, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER AND PETITION FOR REVIEW OF MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC.

To the Honorable Judges of the Ninth Circuit Court of Appeals:

The Mountain Pacific Chapter of the Associated General Contractors, Inc. hereby answers the petition for enforcement heretofore filed by the National Labor Relations Board, and petitions for a review by this Court of the proceedings of the National Labor Relations Board and the order of said Board in this matter.

Answering the allegations of the petition for enforcement, this respondent alleges:

1. This respondent, Mountain Pacific Chapter of the Associated General Contractors, Inc., is a Washington corporation, functioning as a business association to advance the common good of its members, and is not otherwise engaged in business. Its activities are carried on within the Ninth Circuit. Except as admitted herein, this respondent denies the allegations of Paragraph 1 or denies that it has knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

2. Answering Paragraph 2, this respondent admits the entry of an Order by the National Labor

Relations Board under date of December 14, 1957, and admits that the same was served upon it, but denies that said Order was legal or valid.

3. This respondent has no knowledge as to the allegations of Paragraph 3.

Petition For Review

This respondent petitions this Court to review the Order of the National Labor Relations Board in the consolidated cases, before designated cases Nos. 19-CA-1374; 19-CB-424; and 19-CB-445, insofar as said Order was directed against this respondent.

1. This petition for review is made pursuant to the provisions of subparagraph (f) of Section 160, Title 29, United States Code.

2. This respondent alleges that the transcript which will be filed by the National Labor Relations Board in connection with its petition for enforcement will be the same transcript as would be involved in this petition for review.

3. The Order of the National Labor Relations Board is invalid and erroneous for the following reasons:

This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not, and at no time material hereto was, an employer within the meaning of the National Labor Relations Act, nor was it engaged in commerce.

The procedure was not commenced within the

time limited by law, particularly Section 10 (b) of the National Labor Relations Act.

It was not established that this respondent engaged in any unfair labor practice. That it was established that neither this respondent nor its members have any business transactions with the Building and Common Laborers Union of America, Local No. 242, AFL-CIO, or its members.

The findings of the National Labor Relations Board do not support the Order which was entered against this respondent.

The order of the National Labor Relations Board is contrary to law.

Wherefore, this respondent prays that the Order of the National Labor Relations Board be reviewed and set aside as to it, and that the petition for enforcement be denied.

ELLIOTT, LEE, CARNEY & THOMAS,

/s/ By ELVIN P. CARNEY,

Attorneys for the Mountain Pacific Chapter of the Associated General Contractors, Inc.

[Endorsed]: Filed April 28, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, in accordance with the rules of this Court, hereby states the following as the points on which it intends to rely herein:

I. The Board validly determined that the Associated General Contractors Chapters and the Unions respectively violated Section 8 (a) (3) and (1) and 8 (b) (1) (A) and (3) by executing and maintaining in effect the terms of their agreement relative to hiring.

II. Substantial evidence supports the Board's conclusion that the Associated General Contractors Chapters and the Unions, respectively, violated Section 8 (a) (3) and (1) and 8 (b) (1) (A) and (2) of the Act by discriminating and causing the Chapters to discriminate against the job applicant Lewis, and that Local 242 further violated Section 8 (b) (1) (A) of the Act by threats, promises and inducements to withdraw his charge.

Dated at Washington, D. C. this 16th day of May, 1958.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

[Endorsed]: Filed May 22, 1958. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

In the Matter of:

Case No. 19-CA-1374—Mountain Pacific Chapter; Seattle Chapter; and Tacoma Chapter of Associated General Contractors of America, Inc. and Cyrus Lewis.

Case No. 19-CB-424 — International Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL-CIO and Cyrus Lewis.

Case No. 19-CB-445—Western Washington District Council International Hod Carriers, Building and Common Laborers of America and Cyrus Lewis.

TRANSCRIPT OF PROCEEDINGS

Room 407, United States Courthouse, Seattle, Washington, Thursday, October 25, 1956.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Herman Marx, Esq., Trial Examiner.

Appearances: Melton Boyd, Esq., 407 United States Courthouse, Seattle, Washington, appearing on behalf of General Counsel. Lyle L. Iverson, Esq., of the firm of Lycette, Diamond and Sylvester, 800 Hoge Building, Seattle, Washington, appearing on behalf of the Seattle and Tacoma Chapters of the Associated Contractors of America. Arvin P. Carney, Esq., of the firm of Elliott, Lee & Carney, 555 Dexter Horton Building, Seattle, Washington, appearing on behalf of Mountain Pacific Chapter of

the Associated General Contractors of America. Roy E. Jackson, appearing on behalf of the Building and Common Laborers Union of America, Local No. 242, AFL-CIO. [2]*

Proceedings

* * * * *

COLTON HARPER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [11]

Direct Examination

Q. (By Mr. Boyd): Your name is what?

A. Colton Harper.

Q. Your occupation is what?

A. Manager, Seattle Chapter, Associated General Contractors.

Q. You have been manager for how long?

A. One year.

Q. Prior to that time what capacity did you have with the Chapter?

A. I was assistant manager. * * * * * [12]

Trial Examiner: Are you going to prove any specific membership of any concerns?

Mr. Boyd: We have no such purpose in this proceeding. I believe when we get to the place of submitting the case it will appear that that was not necessary.

Trial Examiner: That may be. Do you contem-

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Colton Harper.)

plate any proof of application by the charging party, Mr. Lewis, for employment at any members?

Mr. Boyd: No. The evidence will disclose him seeking work at the union hall. [17]

* * * * *

Q. (By Mr. Boyd): You have produced and I have had marked and I hand you at this time two documents marked General Counsel's Exhibit No. 4, being in duplicate. What do you identify those [18] as being?

A. Those are the existing agreements between Western Washington District Council, International, Mountain Pacific, Seattle and Tacoma Chapters, of the Associated General Contractors of America.

* * * * *

(The document above referred to heretofore marked General Counsel's Exhibit No. 4 was received in evidence.)

[See page 178.]

Trial Examiner: One of them is a duplicate.

Q. (By Mr. Boyd): The recitation at the top indicates that this is an agreement in which the three chapters have joined in one agreement. Did the three chapters participate jointly in the negotiation of this agreement? A. Yes.

Q. And this agreement that is now in evidence is presently in effect? [19] A. Yes.

Q. Your chapter is presently a party to it?

A. Yes. [20]

* * * * *

(Testimony of Colton Harper.)

Q. (By Mr. Boyd): Does this agreement continue to be given effect by your membership?

A. That is a rather difficult thing to say. We continually have disputes over the agreements. Some of our members misinterpret the agreement or do not enforce it or do not work under the agreement as it was intended in the beginning.

Q. These disputes with respect to which you refer are disputes that come to your attention as the association manager?

A. Approximately 50 per cent of them do.

Q. How frequently do they come to your attention, Mr. Harper?

A. Oh, several times a week.

Q. There is a provision within the agreement that provides for these disputes? A. Yes.

Q. Being taken up between a representative of the Washington District Council and the representative of the chapter, isn't that correct?

A. That is correct. [23]

* * * * *

Q. (By Mr. Boyd): Is it not true, Mr. Harper, that it is pursuant to the provisions of subsection (a) of Paragraph 34 that you regularly engage in the matter of seeking to adjust the disputes that arise between the union, on the one side, and the employer members on the other?

A. Yes. [24]

* * * * *

Q. Reference is made in paragraph 28 of the agreement to—that is a permissive provision—read-

(Testimony of Colton Harper.)

ing, "The working rules of local unions which may be accepted as a part of this agreement shall be recognized" and so forth. May I ask, does Local 242 supply you with its local working rules?

A. No.

Q. Do you know whether they have a separate body of local working rules?

A. I have seen them. They do have a separate body.

Q. Is that the printed form you are referring to? A. Yes.

Q. That is, the form of the working rules that are prescribed in the decision that is published with the constitution of the International?

A. Yes.

Q. So in so far as they have working rules your knowledge of them is limited to those printed rules?

A. My actual knowledge of their working rules is limited to those in this agreement. [25]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Iverson): What, if anything, have you advised your members with respect to whether or not under this contract they can discriminate with respect to employment as to whether a man is a member or non-member of a union, particularly if it relates to employment in commerce?

A. We have from time to time advised our members that union membership is not a condition of employment under the law and we have pub-

(Testimony of Colton Harper.)

lished a bulletin within the last year that I think shows that.

Q. Have you at any time advised your members that under this contract it would be necessary for them to secure employees in commerce only from union sources? A. No, I have not. [35]

* * * * *

Q. Does it pay any people under this contract?

A. No.

Q. What is the form of the A.G.C. Seattle Chapter in so far as its organization is concerned, corporation, or partnership, or what?

A. Corporation.

Q. Does the A.G.C. Chapter itself take on any construction contracts? A. No.

Q. Does the A.G.C. Chapter itself do any work in commerce? A. No.

Q. Does the A.G.C. Chapter itself purchase materials received in commerce? [36] A. No.

Q. Have you ever had occasion to undertake to require or enforce as against—to require any member or enforce against any member any requirement that they recruit their employees solely through the union? A. No. [37]

* * * * *

Cross Examination

Q. (By Mr. Carney): Mr. Harper, is there any relationship between your chapter, the Seattle Chapter and the Mountain Pacific Chapter of the A.G.C., by contract or any other instrument?

A. No, there is none.

(Testimony of Colton Harper.)

Q. And you act independently of each other?

A. Yes. [39]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Boyd): As a matter of fact, you know that your membership in regular day-to-day practice follows the provisions of Section 6 in requisitioning employees through the union hiring hall, do you not?

A. I can't speak for any members, not being in their offices. All I could do would be to surmise.

Q. You have not heard any protest from the union of your members departing from that practice, have you? A. Yes, I have.

Q. To what extent?

A. Just being told that the members have done so and they would like to see them comply a little bit, with no threat or anything else, but——

Q. (Interrupting): Have you ever told the union in response to that information that you were not going to be bound by the [43] terms of that section, Section 6? A. No.

Q. And you have continued to publish Section 6 as a section of the contract presently in effect?

A. That is correct. [44]

* * * * *

Mr. Iverson: Of course I don't think, if the Examiner please, that we are confined to written advice. I think that it is perfectly proper to indicate that we had advised these people of this and if we can come up with a written bulletin of that kind

(Testimony of Colton Harper.)

we shall do it. But there is nothing in the rules anywhere that says that the advice must be written.

Now, it is the burden of the government to establish that we have given effect to and enforced this agreement during this time, and it is certainly pertinent, and there is no ground to strike testimony because it's indicated that the instructions were given verbally.

Trial Examiner: It seems to me that Mr. Boyd's motion can be divided into two parts. As far as the question of oral advice to the membership is concerned, I think his objection goes to the weight rather than the materiality. [45] * * * * *

Recross Examination

Q. (By Mr. Jackson): Do you have any knowledge, Mr. Harper, as to whether any of the employees* who may have employed Mr. Lewis, who is the charging witness in this case, were members of the A.G.C.?

* [Note: The word "Employees" appears to be in error and the correct word appears to be "Employers."]

A. When we were first notified of this case I checked with our members and was unable to find any one of our members who had ever employed Mr. Lewis or refused to employ him. [48]

Mr. Jackson: That is all. * * * * *

Trial Examiner: Thank you.

One more question. With respect to this advice about discrimination to which you referred before,

(Testimony of Colton Harper.)

this oral advice, if I remember correctly, you testified you couldn't remember the names of any members to whom you gave that advice. Was this advice that you volunteered or was it advice that was requested?

The Witness: Generally requested.

Trial Examiner: By whom was this requested?

The Witness: That is rather difficult to say, but since we receive many queries during the day on numerous subjects it would be awfully hard for me to even estimate how many people [52] in the six years I have been with the organization have asked me that question.

Trial Examiner: If I understand you correctly at this point, you have no recollection of any member to whom you gave such advice?

The Witness: I can't think of any because I haven't been asked the question recently.

Trial Examiner: When was the last time?

The Witness: Again I wouldn't know, but I would say perhaps in the last six to eight months period I have been asked that question.

Trial Examiner: General Counsel's Exhibit No. 4 was entered into on the 30th day of December 1955 and became effective on the 1st day of 1956. Have you any recollection of any individual who has ever requested such advice, or firm or corporation, any member, and to whom you gave such advice since this agreement became effective?

The Witness: No, I can't remember any indi-

(Testimony of Colton Harper.)

vidual or who it may have been, or who has asked me the question, I can't remember.

Trial Examiner: Do you, in fact, remember giving any member such information since January 1, 1956?

The Witness: Not in specific cases, but I am certain I have.

Trial Examiner: Have you any recollection when the last [53] time was that you did that?

The Witness: Sometime in the last six to eight months.

Trial Examiner: Sometime within the last six to eight months?

The Witness: No; what I mean is between six and eight months——

Trial Examiner: Ago?

The Witness: Yes. I don't think I have been asked the question within the last six months.

Trial Examiner: That takes us back approximately to April or March or February?

The Witness: Yes.

Trial Examiner: And can you tell me how many asked you within that time, that is, up to six or eight months ago?

The Witness: No. The only reason I have a recollection of it at all is that this party who called me had some fellow student who was on a spring vacation whom he wished to employ and he asked me if the fellow had to have union clearance, and I informed him that under the law the man did not. [54]

* * * * *

(Testimony of Colton Harper.)

Redirect Examination

Q. (By Mr. Boyd): Was this with respect to common labor employment or what type of employment? A. Yes, common labor employment.

Q. It involved a student situation?

A. Yes.

* * * * *

Q. What did you say?

A. What I said was that he called me and asked me if he could employ a student as a common laborer on his job for a period of two weeks during spring vacation.

Q. You told him he could?

A. Yes, I told him he could.

Q. That was the extent of the advice that you gave?

A. No. He asked me if he could do it without clearing the man through the union. I said, "Under the law you can do it without clearing the man through the union." [55]

* * * * *

ROBERT F. SHAPLEY

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name and position is what?

A. Robert F. Shapley, and I am the manager of the Tacoma Chapter of the Associated General Contractors. [56]

* * * * *

(Testimony of Robert F. Shapley.)

Q. Have you notified the local in your area or the Western Washington District Council that you were no longer giving effect to paragraph 6 of the agreement?

A. I notified them through their building trades representative.

Q. What was it you notified them of?

A. I notified them that we had issued a memorandum or bulletin to our membership stating that—— [60]

* * * * *

Cross Examination

Q. (By Mr. Iverson): Do all of your members obtain all of their laborers in accordance with Section 6 of this agreement by getting their, by recruiting their, people through the union?

* * * * *

Trial Examiner: The witness may answer if he knows. [63]

A. No.

Q. (By Mr. Iverson): To what extent do they not? [64]

* * * * *

A. Since my short time in Tacoma I believe that there was only once that some union representative objected about a particular contractor because he was hiring men off the street. That is the term that is used. And that is the only particular case that I recall.

* * * * *

Q. Did you undertake to enforce or advise—did

(Testimony of Robert F. Shapley.)

you undertake to advise your members that they must comply?

Mr. Boyd: I object.

A. No, I didn't.

Trial Examiner: Comply with what?

Mr. Iverson: With Section 6, in hiring employees.

Mr. Boyd: I objected to this but the witness has answered, so I will withdraw the objection.

Trial Examiner: All right.

Q. (By Mr. Iverson): Mr. Boyd brought out the fact that you [66] had issued some kind of a bulletin. What kind of a bulletin did you issue?

A. It was a regular news bulletin to the General Contractor members of the organization. [67]

* * * * *

Q. (By Mr. Iverson): Did you ever advise your members as to any change in their attitude or their procedures or anything like that as a result of the Jussel case, and, if so, what did you advise them?

A. I advised them——

* * * * *

Q. (By Mr. Iverson): What did you advise them?

A. I advised them to, in their hiring of their employees, to comply with the Taft-Hartley Law.

* * * * *

Trial Examiner: Well, the bulletin has to be identified. If you are going to lay a foundation for it, you would have to identify it.

Gentlemen, I am going to strike this witness'

(Testimony of Robert F. Shapley.)

testimony [69] as to the contents of the bulletin. As far as I am concerned, the bulletin will have to be identified. If you can agree among yourselves as to a waiver of foundation, that will be perfectly agreeable to me. [70]

* * * * *

Q. (By Mr. Iverson): At any time subsequent to the negotiation of this present contract has the Tacoma Chapter taken any action to require its members to obtain all of their labor employees through the union? A. No.

Q. Will you furnish to me by tomorrow the bulletin that you have referred to? A. Yes.

Q. With respect to that bulletin, what distribution did it have?

A. It was sent to our entire General Contractor membership.

Q. Does it bear the date that it was sent out or can you tell us when it was sent out?

A. Yes, it does. It bears the date. I don't recall it.

Q. Was it sent out on the date that it bears?

A. Yes.

Q. Does your chapter employ any persons under the terms of this agreement itself?

* * * * *

The Witness: No. [72]

Q. (By Mr. Iverson): Does your chapter assume any responsibility for paying any of the people who are employed under this agreement?

A. No.

(Testimony of Robert F. Shapley.)

Q. Does your chapter do any construction work?

A. No.

Q. Does your chapter purchase supplies or materials in excess of a hundred thousand dollars in any year that might cross state lines? A. No.

Q. Is your chapter a corporation or a partnership? A. A corporation.

Q. Have any of the members of your chapter, to your knowledge, ever employed Mr. Lewis?

A. Not to my knowledge.

Q. Do you know whether or not any of your members have refused employment to Mr. Lewis?

A. I haven't heard about it.

Q. Have you any knowledge of any discrimination practiced by the union in the referral of employees to your members with respect to whether they were members or non-members of the union?

* * * * *

A. No. [74]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Jackson): And does your chapter or do the members of your chapter work in the Seattle area as well as the Tacoma area?

A. Occasionally. [75]

* * * * *

Q. (By Mr. Jackson): Showing you what has been marked General Counsel's 4, would you state what that is?

A. This agreement, I am quite sure, without looking at it, going into it, covers not only the

(Testimony of Robert F. Shapley.)
Seattle area but, in addition to that, the Tacoma area. [76]
* * * * *

Q. Do you have any dealings at all yourself with Local 242 here in Seattle, here in the Seattle area? A. I haven't had.

Mr. Jackson: That is all.

Redirect Examination

Q. (By Mr. Boyd): You did say, though, there are times when some of your Tacoma Chapter members will engage in construction work in the Seattle area? A. Yes, I did say that.

Q. At that time is the laborer work force requisitioned through the Tacoma local or the Seattle local? A. Both and partly.

Q. I beg your pardon?

A. Both and partly.

Q. Would you explain that answer? That was just ambiguous enough that it will require some explanation.

A. If the contractor has obtained his men from the union and had worked in the Tacoma area and had certain of his employees working for him there and obtained a job in the Seattle area, he may bring part of those men that he had obtained in Tacoma with him, and also in addition to that he would obtain additional men in the Seattle area. [77]

Q. Tell me this, you are speaking now of where he has a constant labor force, and he may bring a part of them with him?

(Testimony of Robert F. Shapley.)

A. That is true; that is what I mean.

Q. As the core of his working crew, is that right? A. Yes.

Q. In practice are those people directed to clear through the Local 242 in Seattle? A. No.

Q. Those people are cleared by virtue of their membership in the Tacoma local, is that it?

A. The question has never come to my — I am not aware of any type of clearance either way when they come over here.

Q. But as to additional hires that are required beyond his own force, work force, that he brings with him, those he would hire by requisitioning through the Seattle local?

A. He may, yes. [78]

* * * * *

Trial Examiner: Yes. I was referring to a subject that was opened up by Mr. Iverson before, namely, some conversation with a representative of 440. [85]

* * * * *

Q. (By Mr. Boyd): This man with whom you talked, his name was what?

A. I do not recall.

Q. But you know him, then, as a representative of Local 440? A. Yes.

Q. And he was objecting to your membership not complying with this agreement?

A. He was pointing out that they had not.

* * * * *

(Testimony of Robert F. Shapley.)

Q. He was insisting that the contract be complied with, wasn't he?

A. I don't recall that he insisted that it be complied with, but he did object to the manner in which this had taken place.

Q. Was this a discussion——

Trial Examiner: Excuse me just a moment.

Tell us what was said instead of using words like "insist" and "requested" and so forth; tell us what was said and when it was said and by whom. You can wind it all up in one package.

The Witness: Are you asking me to do that?

Trial Examiner: Yes.

The Witness: That is actually a pretty big order. These people call — I mean we have these phone calls and it's very difficult to remember the exact time and place and so forth, [86] but I believe that it was approximately two months ago on some road job—I don't remember, recall, the job—whereby——

Trial Examiner: A Seattle or Tacoma job?

The Witness: I believe it would have been in—well, it would have been in the Seattle jurisdiction, within the jurisdiction of the Seattle union.

Trial Examiner: All right, go ahead, sir.

The Witness: And that some objection was made to the manner in which two or three men were hired, something like that, I don't remember definitely, but some men were hired that the union objected to for some reason or other. I have even for-

(Testimony of Robert F. Shapley.)

gotten what the reason was. They made known those objections to me.

* * * * *

Trial Examiner: Do you recollect whether the conversation had anything to do with any individuals being hired [87] directly by your members?

The Witness: To be truthful, I don't know whether it was that or whether it was which union the men belonged to, whether they were in a different union than this union or whether it was thought they should be in their union or a different local, something of that type. I actually don't recall exactly what it was.

Q. (By Mr. Boyd): It may have been, then, an issue as to whether Locals 440 or 242 or your local down there had the right to do a certain type of work, is that it?

A. Something on that order, I imagine. It's mainly the issue was I don't believe the men belonged to 440, and that was the issue. [88]

* * * * *

Trial Examiner: Is the Labor Committee composed of members of your organization?

The Witness: Yes.

Trial Examiner: Can you tell me what the basis is for their purported power to negotiate these agreements?

The Witness: I believe it's specified in the by-laws that a negotiating committee—— [89]

* * * * *

WILBUR H. LANDAAS

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): And your employment?

A. Manager of the Mountain Pacific Chapter of the Associated General Contractors.

Q. Your organization has membership that operates in what area?

A. In the fifteen counties of western Washington principally, but they operate also outside of that area.

Q. Is there a particular distinction between the membership of your organization and the membership of either the Seattle Chapter or the Tacoma Chapter?

A. Yes, there is. Our organization members are engaged principally in highway and heavy construction as opposed to building construction.

Q. Do you have members who are engaged in building construction work?

A. We have members who may do building work, but our members are principally engaged in heavy and highway construction. They may do all kinds of work.

Trial Examiner: They are general contractors?

The Witness: They are general contractors.

Trial Examiner: As far as you know, or do you know, whether that is true of the other two chapters involved in this proceeding?

(Testimony of Wilbur H. Landaas.)

The Witness: There are some members of the other two chapters who likewise are engaged in all phases of construction work. But the Seattle Chapter's members are principally [92] engaged in building construction.

Trial Examiner: As general contractors?

The Witness: As general contractors. And the Tacoma Chapter has members who do both building and heavy and highway work. [93]

* * * * *

Q. (By Mr. Boyd): In order not to burden the record with additional exhibits, does not your by-laws provide, and I quote from Article I, subparagraph (c):

"To secure uniformity of action among the members forming the chapter, upon the general principles set forth in the constitution and by-laws of this chapter, and upon such other special lines of action as may be decided upon from time to time as being best for the interest of the chapter and for the good of the industry as a whole."

Have I quoted correctly from one of the aims of your organization? A. Right.

Q. Does not your rules of procedure under Article I, subparagraph (k), provide:

"All labor negotiations shall be handled through the Mountain Pacific Chapter office and under the jurisdiction of its duly elected labor committee. Individual members shall not, under any circumstances, sign agreements with any Labor Collective

(Testimony of Wilbur H. Landaas.)

Bargaining Agency without first obtaining specific approval from the Mountain Pacific Chapter''?

That is a provision within your rules of procedure? A. Right. [97]

* * * * *

Trial Examiner: Were those rules in effect at the time the contract, General Counsel's Exhibit No. 4, was negotiated?

The Witness: Correct.

Trial Examiner: Was there a labor committee in existence at that time?

The Witness: Yes.

Trial Examiner: Did the Labor Committee participate in those negotiations?

The Witness: Yes. [98]

* * * * *

Cross Examination

Q. (By Mr. Carney): What is the nature of your association as to whether it's a corporation, partnership, or otherwise?

A. It's a corporation.

Q. Does it have any contractual agreement or arrangements with the other three chapters, namely, Seattle and Tacoma? A. No.

Q. It's completely autonomous in its own field?

A. Yes.

* * * * *

Q. Does the Mountain Pacific Chapter, as such, buy or sell goods in interstate commerce in excess of a hundred thousand dollars? A. No.

Q. Does the Mountain Pacific Chapter, of itself,

(Testimony of Wilbur H. Landaas.)

enter into contracts to build buildings, highways, and other structures for others?

A. No, sir. [99]

Q. Do you have any contract, other than General Counsel's Exhibit 4, with Local No. 242 of the International Hodcarriers? A. No.

* * * * *

Q. (By Mr. Carney): Do you as a chapter have any negotiations with Local Union No. 242?

A. No negotiations and no contract.

Q. Why is that?

A. Local 242 is principally a union that supplies workmen on buildings, and to the best of my knowledge, in the nine years I have been with the association I have not had any occasion to have any conversation other than* in negotiations or in labor disputes between our members with Local 242.

* [Words "other than" appear to be surplusage.]

Q. So you have no contact with them as such as a labor organization?

A. Not in so far as labor relations are concerned.

Q. Do you know whether any of your members have any transactions with Local 242?

A. They might. I am not aware of it. It could be, but I am not aware that they have had transactions with Local 242.

Trial Examiner: Do you know whether they get any [100] laborers from that local?

The Witness: The District Council of Laborers,

(Testimony of Wilbur H. Landaas.)

the composition of it, is that, generally speaking, they are both combined building and heavy and highway local unions, but in Seattle they have two separate local unions: one is building, supplies men to building construction; and the other supplies men to heavy highway, sewer disposal and that type, as compared with building. And most of our members deal almost exclusively with Local 440 in this area.

Q. (By Mr. Carney): Has Cyrus ever applied to your association for employment? A. No.

Q. Has he ever been employed by your association? A. No.

Q. To your knowledge, have any of the members of your association employed him?

A. Not to my knowledge, no.

Q. To your knowledge, have any of them refused to employ him? A. No.

Q. Do you as an association participate with your members in securing labor forces for your members, in hiring employees?

A. No, absolutely not.

Q. Do you have anything to say to your members about the discharge of employees? [101]

A. No.

Q. Is there any necessity in your industry for a hiring hall of some kind?

A. Oh, absolutely. Whether we have unions or not we would still be required to have a pool of men, of qualified men, to man these jobs. Construction is not only a matter of obtaining men, it's a

(Testimony of Wilbur H. Landaas.)

matter of obtaining skilled men, for safety purposes. One man can cause a falling of a structure that can damage property and kill workmen. Furthermore, the construction industry pays some fifty per cent more for its workmen than other organizations or other activities, due to the fact that we demand highly skilled men. Our labor agreements—I am saying this very, very frankly—are negotiated to obtain for our members skilled men. If the union doesn't have skilled men, our people can get men wherever they want, but we need skilled men. We have to have some source for obtaining those people. We can't go to anyone because we have a jargon of the trade that is necessary, just as much as skill. We have a very specific problem. We perform work for governmental agencies and our work is of a very dangerous nature, and it's tremendously important that we have available people who can make use of this highly technical equipment that we operate.

Trial Examiner: Tell me this, please, while we are on the subject: how many of your members, if you know, employ [102] laborers who perform the work coming within the jurisdiction of Local 440, let us say, how many of your members employ laborers all year-round, that is, the same laborers?

The Witness: They may have some all year-round, but it would be a very small number. There may be some that are kept on the payroll the year-round, but the great bulk of the workmen that are required are required during the working season,

(Testimony of Wilbur H. Landaas.)

which is from five to maybe a maximum of nine months.

Trial Examiner: Well, typically, what happens to a laborer who is on a job for, let us say, thirty days, which is the duration of the job, typically does he remain on the payroll after the expiration of the employment on that particular job or does he go off the payroll?

The Witness: Remember, construction is a very fluid operation.

Trial Examiner: I remember, but I want to know it for this record.

The Witness: One contractor may have five jobs going, he may have three jobs going, he will transfer the bulk of workmen maybe this week from one operation to another operation on another job; it may even be out of the territory. When the operation is completed he will terminate the services of those workmen. He will maintain a very small number of men to maybe clean up his equipment or tools and to put his job in ship-shape prior to turning it over to the awarding agency. [103]

Trial Examiner: Is there any reason why he cannot conveniently hire those workmen whom he has terminated for his next job himself? Is there any reason for that?

The Witness: Why he can't?

Trial Examiner: Why he can't, any reason of convenience, yes, directly.

The Witness: He may, any one contractor, and most of them follow this practice, are bidding in the

(Testimony of Wilbur H. Landaas.)

common working area of this northwest. Now, we have jurisdiction over Western Washington, but our members are figuring just as much work in eastern Washington or maybe northern Idaho or Montana or Oregon, wherever there is work they figure on, they figure on a job. Even within the given area of Seattle he wouldn't necessarily know what men can perform a particular operation. He is dependent upon a source of manpower dispersal to get the kind of people that he needs. Now, we have a show-up clause—this is maybe not pertinent, but it's terribly important to the problem that our members are faced with——

Trial Examiner: It may be quite pertinent. Go ahead, sir.

The Witness: They are required to pay four hours whether the man works or whether he doesn't work. The reason for that is good. It prevents a contractor who is not a human person from just willy-nilly calling, having, men report to work whether he wants them to work or not. So rather than [104] deprive those men of a chance to work somewhere else, he is required, if he calls them to work, to put them to work, so, therefore, he is out of pocket $10 when he calls one man to report for work. Now, he can't maintain a processing facility to determine whether these men whom he needs are qualified to man all this very technical and very expensive equipment, so he must count, he is completely dependent, on a source of information to supply him with good qualified men. Our agreement

(Testimony of Wilbur H. Landaas.)

only calls for qualified men. If the men are not qualified, then they can get, they are free to go and get, men wherever they wish.

Trial Examiner: How long has this hiring hall procedure, to your knowledge, been in effect?

The Witness: It's been in effect that ten years that I have been connected with the association, and I have——

Trial Examiner: That is all you are in a position to testify to, is that not so?

The Witness: I am aware that it was there much longer than that. [105]

* * * * *

Trial Examiner: Have you members who go to, say, Idaho from the Seattle-Tacoma region performing contracts?

The Witness: Yes, sir.

Trial Examiner: Have you any members in Idaho?

The Witness: We have members who perform work in Idaho, but not members, Idaho members, who just join our chapter, no.

Trial Examiner: Well, what would a member who performs work in Idaho but has his headquarters in the Seattle-Tacoma area do to get laborers in Idaho?

The Witness: That is a very good point. Even though the wage rate in Idaho may be very much less, even though they may have no hiring provisions whatsoever, we would still take, our members would take, their men from Seattle to Idaho to per-

(Testimony of Wilbur H. Landaas.)

form work. The skill of the workmen is so essential to the [106] operation of construction work that they take their men that they know and can count on.

Trial Examiner: Where would they get the men?

The Witness: They would take them right from whatever area they were operating in. If they were operating out of Yakima, they would take them from Yakima; if they were operating out of Seattle, they would take them from Seattle.

Trial Examiner: But where would they recruit them? How would they recruit them?

The Witness: The men they would take would be those on their payroll at the time.

Trial Examiner: How would they recruit men who are not on their payroll? That is what I am trying to find out.

The Witness: They would recruit men that they need from the source of information, the only source of men that is available; the qualified men are at the union hall.

Trial Examiner: All right.

Q. (By Mr. Carney): What he is trying to get, Mr. Landaas, was, in Idaho, if the man went there without a crew, where would he get his Idaho crew?

A. He would have to go to a labor organization.

Q. In Idaho?

A. To find qualified men.

Trial Examiner: I am not trying to find out from you where he would have to go. What I am

(Testimony of Wilbur H. Landaas.)

trying to find out from [107] you is if you know what he does do. What is the practice?

The Witness: That is it. They would go to the union to obtain the men that they need to man the equipment that they have to man.

Trial Examiner: From your knowledge of the industry can you tell me why that is so?

The Witness: It's necessarily so. A shovel runner, a powder man, is a man that can do, that can perform, considerably more work than someone who isn't experienced with it. He is also a safer man and he can perform the work in accordance with the specifications that we have to operate under.

Trial Examiner: What is a powder man?

The Witness: A man that shoots dynamite. [108]

* * * * *

Redirect Examination

Q. (By Mr. Boyd): What you have described in response to the Trial Examiner is the practice of your association members, that they follow. When they need men who are not already in their employ, it is their practice to call the hiring hall of the union that is local to that community in which they are working and recruit their force from that union?

A. With this one difference in what you say. There is a very definite distinction. If the men are not skilled, if there is an unskilled—we are not obligated to go to the union for someone who is not qualified, not a skilled man, we are not obligated to go anywhere. The union doesn't even expect us to

(Testimony of Wilbur H. Landaas.)

call upon them. But when it comes to men to man the classifications that we have in the agreement, which are skilled classifications, then we call on them because they have the men, not because we have to go to them but because they are the only source of information that we have available.

Q. But as a matter of fact, you agree in the agreement, do you not, to secure these men from the union? A. Only qualified men. [109]

* * * * *

Q. (By Mr. Boyd): As a matter of fact, do not your employer members seek to get whatever work force they need through the hiring hall? They don't hire off the banks in practice, do they?

A. I will bet our members have hired two hundred people this summer. I know of fifty students that were hired directly from the University, but for unskilled work.

Q. Was this the subject matter of complaints that the union made to you? [110]

A. No, not at all.

Q. How did this come to your attention?

A. Because we made arrangements with the university and we discussed it with the union, to place some of these engineering students and acquaint them with construction, that we felt would be a good thing for the industry, to develop engineers that would, instead of going into other fields of work, that would go into construction operations.

Q. This group of people you speak about, did

(Testimony of Wilbur H. Landaas.)

the union, with respect to that group of people, agree that they might be hired?

A. It was just a courtesy to let them know what we were doing.

Q. Did you not get an agreement from them with respect to requiring a referral from the union?

A. No.

Q. Was there not an understanding reached between you and the union that no referral would be required with respect to these university students?

A. Not with us there wasn't. [111]

* * * * *

Trial Examiner: I assume the General Counsel is aware of the extensive prevalence of these nondiscriminatory hiring halls and their extensive history in many industries of the country, including the shipping industry, the longshore industry, and so on? I assume that the General Counsel is aware of that.

Mr. Boyd: I am aware of it.

Trial Examiner: I am referring to the General Counsel, not to his representative.

Mr. Boyd: You are referring to the capital C General Counsel, not the little one down here at this level?

Trial Examiner: Yes.

Mr. Boyd: I think he is, but specifically in this proceeding we are interested in having the Board understand the theory of our litigation here; we are having the Board examine in this context what we believe it has said in another context.

(Testimony of Wilbur H. Landaas.)

Trial Examiner: To make myself clear, I am not suggesting that there is anything wrong in re-examining these positions. I simply wanted to make sure that I am absolutely certain of your position, that you contend that this contractual [113] language standing alone is unlawful.

Mr. Boyd: That is right. [114]

* * * * *

Q. (By Mr. Boyd): Apart from these who had student standing, with respect to persons employed to do common labor, have not your membership been required by the agreement to secure them, to recruit them, by calling the union to have such men dispatched? [115]

* * * * *

A. That is a difficult question to answer. I would have to answer it in my own way.

Q. (By Mr. Boyd): Give whatever answer will fully explain your position.

A. And it's a repetition of what I said before, that our people are required by circumstance to obtain qualified men from a source where those qualified men are available, whether we had unions or not, we would still have to have that type of pool, of facility available. By necessity of their job they are required to get skilled men from that source, and that source is the union. Unskilled men, they are not required, and they can get men wherever they want; there is no discrimination anywhere for unskilled men.

Q. My question of you was with respect to men

(Testimony of Wilbur H. Landaas.)

who are doing common labor. You characterized those as skilled or unskilled; I am not sure of what your classification may be. But men who are employed to do common labor, are they, as you know of the practice, secured by your employer members under the provisions of Section 6 of the contract through the Common Laborers' hall?

A. Necessarily so. And in order to obtain the type of [116] people that they require for their jobs, they have that one source available to them.

Q. Very well. I am content with your answer, but in order to make it abundantly clear, you are saying that only university students are the ones who are not qualified, is that it?

A. No. I just gave that as an example. There were many more than that who were employed this summer.

Q. For what type of work and where?

A. Well, that is quite a problem. We are building up a much greater volume of construction work in the area, the road program is expanding; the tremendous natural gas development caught us with a tremendous shortage of all classifications of men. It's necessary to train men. This year we had to take people and train them. Large numbers of people were brought into the game and trained by contractors this summer, even on shovels and bulldozers and——

Q. Weren't those people whom you secured to do any work that required no skill at all directed to

(Testimony of Wilbur H. Landaas.)

go down and clear through the union hall? Wasn't that a point of controversy?

A. I don't believe so, but I can't answer you directly. I don't know, unless——

Trial Examiner: Have you any personal knowledge of this?

The Witness: Yes, I know that many of them were not cleared through a union, but I can't answer his question [117] specifically.

Trial Examiner: Do I understand you cannot answer because you do not know? Is that the point?

The Witness: I can't break it down, but I do know, based upon the information that comes to me from my members, that many men were trained and they were taken from where they could get them.

Q. (By Mr. Boyd): Trained to do common labor that was not sent out through the union hall?

A. No; that was to—well, some of them, yes.

* * * * *

Trial Examiner: Doesn't your case shake down to this, Mr. Boyd, in a nutshell—I am still trying to find out—if you establish that either one or both of the labor organizations involved here discriminated in the dispatch of the charging party or others, it was the associations who created the conditions for that discrimination through the provisions [118] of the contract, and therefore they have violated the law? Isn't that your position?

Mr. Boyd: That is correct.

* * * * *

Trial Examiner: Look, I don't want to speculate

(Testimony of Wilbur H. Landaas.)

about what may come out in the evidence later, but I am meeting your complaint, and if I read your complaint right, what you are alleging is that the union discriminatorily refused to assign the charging party, Mr. Lewis? Is that right?

Mr. Boyd: That is right.

Trial Examiner: That is what you come down to?

Mr. Boyd: That is right.

Trial Examiner: And you say that the associations have joint responsibility because, by reason of their agreement to the Section 6 of G. C. 4, they make this alleged discrimination possible. Is that correct? [119]

Mr. Boyd: That is right.

Trial Examiner: If your thesis is correct, if it is correct, what difference would it make if there had been some exceptions, et cetera, et cetera?

Mr. Boyd: I would think it would make no difference if those exceptions were insubstantial.

Trial Examiner: But the law reaches discrimination wherever it exists, if it's unlawful——

Mr. Boyd: That is right, but I was endeavoring in this case, Mr. Examiner, to prove that the system operated as against a class of people and not simply Lewis.

Trial Examiner: All right, let's pursue the system in ten minutes. It's long past our time for a recess. Let's take a break for ten minutes now.

(Short recess.)

Trial Examiner: The hearing will be in order.

(Testimony of Wilbur H. Landaas.)

Q. (By Mr. Boyd): One other question I would direct to you, Mr. Landaas, is this: you say that in calling for men at the union hall you expect to get qualified workmen? A. Yes.

Q. Has your organization or any of the A.G.C. chapters, so far as you know, established any standards or description of job content which is to control the local union in determining the qualifications of people who are to be dispatched?

A. Every employer that needs a man will describe what he [120] needs in great detail, as to type of man he needs, when he is in need of a man.

Q. What you are saying is that reliance is then placed upon the union dispatcher to determine that the man whom he dispatches has whatever qualifications that he understands the employer wants?

A. I think you have to be quite familiar with construction to know what our problem is. We are constantly getting new and better and more complicated pieces of equipment. Construction is not done by a shovel, the common, ordinary number two hand shovel, any more; it's done with machinery: and the classifications that are spelled out in the agreement are pretty well known. We not only sit down in negotiations, we also meet with these people throughout the year. We work together principally because we have a tremendously important job to perform. They have a responsibility with us to obtain the type of men that our people need to man a job properly. I don't think

(Testimony of Wilbur H. Landaas.)

there is any question in anyone's mind in the business that when a man has called for a wagon drill operator or for any of these classifications but what it's understood that——

Q. (Interrupting) Now, even though you do, your employer member may specify what a wagon drill operator or a mixer or a power operator, whatever it may be, the matter of selecting which man shall be dispatched, however, is reposed in the [121] union dispatcher, is it not?

A. Oh, I don't believe that is true. I think they pick, they may name, someone who has been working with them before, for example, and ask them if they are available.

Q. All right. Except for the situation where they name a man by name, then the qualifying factor is, is this the person who has that name, but except for that do they not entrust the matter of selection entirely to the union dispatcher?

A. Not entirely, but to a great deal, yes, sir, that is true.

* * * * *

Q. (By Mr. Boyd): Do you recall the incident you were searching for in your mind awhile ago?

A. I do know a great number of men were employed this summer by our members outside of the union hall facilities. I can't name any company, any man. It has been reported to me——

Trial Examiner: That is just the problem with this whole line of interrogation and testimony; a great deal of it. Here is a gentleman who per-

forms while collar duties in some office; obviously what takes place at the union hall is not performed in the office, and obviously what takes place at [122] some distance from his office by people in the field working on construction jobs is not conducted in his office. What he hears from various people is obviously not probative. There has been the underlying reservation in my mind throughout a great deal of this line of interrogation that it is pure hearsay. If you have any probative evidence as to what the practice actually was, that is another story. But I am wondering how one can do anything but base speculative findings as to what actually happened in relation to the hiring of men if he himself did not have anything to do with it.

Mr. Boyd: I do not differ with the observation of the Trial Examiner. In view of the witness' disclosure that he is only able to identify the name of someone who made a report to him without being able to specify the detail of what he is alluding to, I believe that his testimony would have no value, and while I can't ask that it be stricken, because I invited it, I would have to in passing say it proves nothing.

Trial Examiner: All that I get back to is the very basic question in this case. There is an agreement which, as I understand the testimony, carries out a practice of many years standing. I assume from the allegations of your complaint that your position will be that the union has discriminatorily dispatched Mr. Lewis or failed to dispatch

him, as the case may be, and that you are alleging that the three chapters, because they agreed to Section 6 of the contract, have joint responsibility for such discrimination. [123]

Mr. Boyd: That is right.

Trial Examiner: Outside of that, I think we get bogged down into a whole lot of hearsay as far as these witnesses are concerned, because all they appear to do is get scatterings of information over the telephone, second-hand at best. I don't know that that is helpful to the basic question we have to have determined.

Mr. Boyd: In view of the witness' last answer, I have no further inquiry of him. [124]

* * * * *

(The document heretofore marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

Trial Examiner: There is no testimony. By the way, there is some vague reference to the distribution in Mr. Harper's testimony, but we don't know specifically when it was distributed and to whom, but we will leave that to your [126] discretion, and we will let it stand as it is.

Mr. Boyd: I would make the offer with the further stipulation, that this was a bulletin issued on or about the date of August 23, 1956, which was sent to the membership of the Seattle Chapter of A.G.C.

Mr. Iverson: I think that is correct; it went to the general membership.

Trial Examiner: Can you all agree to the fact, gentlemen?

Mr. Jackson: Yes.

Mr. Carney: Yes.

Trial Examiner: All right, it will be received.

Mr. Boyd: I will call Mr. Buchanan.

ROBERT BUCHANAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name is what, sir?

A. Robert Buchanan.

Q. For six months of this year what was your employment?

A. I was secretary of the Building Laborers Local 242, financial secretary. [128]

* * * * *

Q. How long have you known Cyrus Lewis?

A. I wouldn't know. It was quite a few years ago that I met him first. I wouldn't recall when I met him first, but it's been quite sometime.

Q. Have you recently examined your own union records to refresh your recollection as to when he gained membership in your organization?

A. Back in '43 or '44, back in the forties, in the early forties, I think it was.

* * * * *

Q. (By Mr. Boyd): Did he at that time continue his membership?

(Testimony of Robert Buchanan.)

A. Oh, he continued it for sometime. I don't know whether he transferred out, but he must have continued it for a year or so anyway, or around that. * * * * * [130]

Q. In the spring of this year, Mr. Buchanan, was he then a member? A. No, he was not.

Q. So far as you have a recollection—did Lewis in 1956, following the first of the year, seek work through your hiring hall?

A. I believe he did. [131]

* * * * *

Q. Bearing in mind that date, and by reference to a calendar for the month of May of 1956, May 14 appearing to fall on Monday, I ask you this, do you recall the discussion you had on that day with Lewis about him having filed this charge?

A. I don't recall—do I recall a discussion with Mr. Lewis on that charge? [132]

* * * * *

Q. Do you recall what Leo said to you when Mr. Lewis came up that morning?

A. No, I don't recall what he said to me.

Q. All right, keeping in mind that this was at the time that the copy of the charge was received, which was on May 14, I will ask you if you recall the circumstance that occurred on the preceding Wednesday, May 9, where you saw Lewis on a job.

A. That was on the 9th? Well, yes. Now we will piece this together. He was at that particular time, Mr. Lewis, I believe, was working on a construction building on Denny Way, an addition

(Testimony of Robert Buchanan.)

to the Teamsters' Hall, I guess that is the day you refer to.

* * * * *

Q. Had your union dispatched him to that job?

A. No.

Q. What did you do when you found him working on that job?

A. I asked Mr. Lewis who he was working for.

Q. That is right. Did he point out to you the man he was working for?

A. He pointed out the man he was working for.

Q. Then what did you do?

A. Well, the man who he was working for wasn't the contractor, he was the house mover who had——

Q. He was the subcontractor?

A. He took a subcontract to raise* the building, yes. [134]

[* Note: Transcript incorrectly spells the word "raze" as "raise" on line 25.]

* * * * *

Q. And there was a discussion as to whether or not the union would send Lewis out on a job? Do you remember this conversation?

A. No, I don't think it was a discussion as to whether he would send him out, as to whether he* would take Lewis into the organization.

*[Note: Transcript incorrectly spells word "we" as "he" on line 13.]

* * * * *

Q. Do you not recall that there was some dis-

(Testimony of Robert Buchanan.)

cussion as to whether Lewis would have to choose whether he wanted to go out as a common laborer or as a hod carrier?

A. That is correct, yes, we have separate classifications.

Q. Do you not recall that you told Dan Boyd to send Lewis back down and have him tell you whether he wanted to go out as a hod carrier or a common laborer? A. That is correct, yes.

Q. Following that conversation you had with Dan Boyd, whether you remember it to be on the telephone or otherwise, [137] following that, didn't Lewis come back down to the hall on the following day, the 15th? A. I believe he did.

Q. Did he on that occasion, to your recollection, inform you or Leo in your presence that he wanted to go out as a hod carrier?

A. Yes, that is correct.

Q. At this juncture, in order that the Trial Examiner will understand it and that the record here will show it, what was at that time your procedure that you followed in the hall with respect to dispatching hod carriers as a group, in comparison to the construction laborers or common laborers as a group? First, were they dispatched at the same room? A. No.

Q. You had separate rooms for them?

A. No; separate windows. Separate windows.

Q. Separate windows. All right, who did the dispatching of the hod carriers?

(Testimony of Robert Buchanan.)

A. Leo Allman did the dispatching of the hod carriers.

Q. Who did the dispatching of the common laborers?

A. Leo also handled the both of them.

Q. He handled both windows?

A. Both windows, yes.

Q. With regard to the common laborers, did you have a [138] register there of any kind for them?

A. Yes.

Q. How many registers did you carry at your window? How many registers did you have at your window?

A. We just had the one book.

Q. What was your system at that time about registering those who wanted work?

A. Well, they came and signed their name on the book and then they took their turn, that is, they, unless they were special provisions, that they wanted a buggy man or a jackhammer man or something like that, the laborers put their name on the book, all the laborers put their name on the book.

Q. When they signed their name on the book were they given a number? A. That is correct.

Q. They were given a number?

A. They were given a number.

Q. You are saying that they were sent out according to their number unless they were asked for by special name?

A. That is correct. Or else if, like transporta-

(Testimony of Robert Buchanan.)

tion or something like that, to go down and get someone with transportation or——

Q. What about your non-members, what did they sign?

A. They put their name in, we took their name on the back of the regular dispatch book. [139]

Q. But normally in your dispatching of people to the common laboring jobs, you would dispatch by number as long as there were people there holding numbers? A. That is correct.

Q. Then, when you had exhausted those who held numbers you would then dispatch those who had no number, whose names were on the back of the registration?

A. If they were present. We used the same procedure, only in reverse, we dispatched the non-members in rotation according to their number if they were present.

Q. As to the hod carrier group, Bob, did you have a registration book for them?

A. No, we didn't have a registration for them. They are quite fewer, there are not too many of them, and they are more regularly employed than the laborers, they work for the same contractors, some of them work them for a year and two years, we had no book for them, we just had to remember who was there until a call came in.

Trial Examiner: Do you remember who was idle?

The Witness: Just, just to remember who was reporting; if someone called up and said, "I am

(Testimony of Robert Buchanan.)

through, I will be down to the hall", or something like that.

Trial Examiner: Did you ever have a situation where more than one man was idle?

The Witness: Oh, yes. [140]

Trial Examiner: How would you pick which one to call?

The Witness: We would give the members their choice to a certain extent. In the hodcarrying business there are some hod carriers who won't work for certain contractors, and others prefer to work for that contractor, so we let the members decide which one to go to, if there were some more men there, and also one or two calls.

Q. (By Mr. Boyd): So that we may understand fully your answer, approximately what was the number of hod carriers that had membership in your organization? A. Altogether?

Q. Altogether. A. Around 70, I believe.

Q. Approximately what was the number of those who fell in the class of common laborers or construction workmen in your organization?

A. Around 17, 18 hundred.

Q. Seventeen hundred?

A. Yes, around that figure, yes.

Q. Normally, in normal operations, about how many hod carriers would show up on a morning, in the course of a morning, for dispatch?

A. Oh, five, six and seven there at one particular time. During the time Mr. Lewis was there there was no plastering going on, there were a

(Testimony of Robert Buchanan.)

group of plasterers and hod carriers [141] idle for a matter of five or six weeks at that particular time. All the work had been caught up and there were probably six or seven there almost every day.

* * * * *

Q. Do I understand from your answer that, with respect to the hod carriers, you would let the members choose which contractor, whether to go out with a particular contractor?

A. Yes, that is true. We allow the members that preference, the hod carriers that preference. In other words, say, Mr. Boyd called for a man, he would say, "You give that to someone else, I don't want to work for him", that was their privilege to do so.

Q. But if this particular hod carrier had worked for this man before, he had the privilege of claiming that job, is that what you say?

A. If he wanted to go back there, yes, that is correct, if he wanted to go back.

Q. You are saying this was the right that was given to the members. How was the determination as to non-members [142] made, in sending them out on hod carrier work? Or did you send non-members out on hod carrier work?

A. That is, we have sent them out. Naturally there would be times when the regular members were not there.

Q. When the regular members were not there and there was a job available, you would send the non-member out, you would send out a non-mem-

(Testimony of Robert Buchanan.)

ber? A. Yes.

Q. You have rather conscientiously observed the obligation that is set out in your constitution with respect to your giving preference to members over non-members? A. Well——

Q. I direct your attention——

Trial Examiner: He said, "Well", and that is all.

Mr. Boyd: I see.

Trial Examiner: The question, have you conscientiously adhered to the rules that have been read to you by Mr. Boyd?

The Witness: I try to follow the constitution as nearly as possible, yes.

Q. (By Mr. Boyd): You also have tried to follow the obligation that you took as an official of the union, too, have you not? A. Certainly.

Q. Included in that is the provision, I quote: "And I further promise that I will do all in my power to procure employment for such brothers as may desire situations in preference to any and all non-union men". That has [143] been a part of your obligations, hasn't it?

A. That has been a part of our obligation, yes, sir.

Q. And you have lived up to that?

A. As near as possible.

Q. And is it not true, Bob, that officers, so far as you have been able to observe, the officers of your local union have continued to live up to this particular part of their obligation?

(Testimony of Robert Buchanan.)

A. Now, I can't speak for them, but I suppose that they lived up to the general provisions of it, yes. [144]

* * * * *

Q. I direct your attention now to the date of May 23rd and ask you if you recall him coming back in off the Landrus job and you and Leo and him talking at the dispatch window.

A. I believe, yes, I recall that, yes.

Q. What is your recollection of what took place at that time?

A. I guess Mr. Lewis talked about coming back into the organization, I believe that was part of our conversation, about becoming a member again of the organization.

Q. That he wanted to become a member of the organization? [146]

A. Of the organization, yes.

Q. What was said to him?

A. I believe we told him if he would get out and fill the bill and behave himself he could become a member.

Q. Do you remember anything else that was said to him?

A. Well, I don't recollect that anything much else was said to him.

Q. Is it your recollection that you did the talking to Cyrus or did Leo do the talking to Cyrus?

A. Leo did the most of the talking. I didn't do much talking the last month I was down there.

(Testimony of Robert Buchanan.)

I had just got over a bad heart attack and I didn't get into a controversy with anybody. [147]

* * * * *

Trial Examiner: In the laborers' register, if a man's number came up and he wasn't in the hall, what was your practice, what is your practice?

The Witness: He would miss his number, he would have to come and reregister again. He would lose his turn on the list. He might be working someplace. [152]

Trial Examiner: All right. But if he wasn't working someplace and if he wasn't in the hall, what would you do?

The Witness: We give him a new number.

Trial Examiner: You give him a new number?

The Witness: That is correct.

Trial Examiner: Would he go to the bottom of the list?

The Witness: Yes, he would go down below the last one who registered before, previous to him coming back in.

Trial Examiner: Do I understand, to get a job you had to be in the hall at the time your number came up? Is that correct?

The Witness: That is correct.

Trial Examiner: There is no provision for calling a man or getting in touch with him?

The Witness: On a special, if some particular man was called for, we would get him, even go out and look for him, that is, if some contractor

(Testimony of Robert Buchanan.)

wanted some special man whose name was on the list, irrespective of what number he had.

Trial Examiner: But supposing a man isn't specifically asked for, a call comes in for a man, does he have to be in the hall to be dispatched?

The Witness: Oh, yes, because they want him right at that particular time, that is, there is no, generally they want him inside of the quickest possible transportation to the job. [153]

Trial Examiner: Do I understand also that in those circumstances, if a man who is not a member is in the hall and a man who is a member is in the hall, that the man who is a member will be dispatched?

The Witness: He will have the first preference, that is correct.

Q. Is that also true of the hod carriers' window?

A. No. We have no list for them, it is a matter of just finding who is out or which one they will fit in with. The hod carriers have a separate setup entirely.

Trial Examiner: All right, sir.

Cross Examination

Q. (By Mr. Jackson): Mr. Buchanan, I believe you said you had been there 34 years, that is, up until this past year, as the secretary and business agent of Local 242. A. That is correct.

Q. And this hiring hall procedure which you have described with reference to dispatching men,

(Testimony of Robert Buchanan.)

how long has that existed there at the Local 242 Union?

A. Way back into 1924, '25, we had that same system.

Q. And that same system has been carried on through all these years?

A. Has been carried on through all these years.

Q. And you have had the same system with reference to dispatching hod carriers? [154]

A. That is correct.

Q. And the same is true of dispatching laborers? A. Yes.

Q. Mr. Buchanan, Mr. Boyd asked you about Mr. Lewis. I believe you said that Mr. Lewis had become a member, I think the record shows here he became a member in 1943, I believe the record shows that is when he first became a member, and then in October of 1943 Lewis was suspended from membership for non-payment of dues. To refresh your recollection, would that be about right?

A. That would be fairly close, yes.

Q. Then later on in 1947 it shows that in January, January 16, 1947, he again became a member and then was a member until October of 1949 when he was again suspended for non-payment of dues. Would that be correct?

A. That is approximate, that is, I couldn't say the exact years, but that is about the time, yes, two years' time, yes.

Q. Between 1949 and 1956 when you have testified, in May of 1956, when Mr. Boyd asked you

(Testimony of Robert Buchanan.)

concerning these questions, during that period, I understand, he was not a member of Local 242?

A. That is correct.

Q. And had not been dispatched out of the hall on any work here in Seattle? A. No, no, sir.

Q. Then sometime in 1956 he showed up at the hall and was looking for work, is that my understanding?

A. Yes, I believe it was in early '56, yes.

Q. And he was classified at that time as a suspended member? A. That is right.

Q. When your members of the union fail to pay their dues, is that the method of penalizing the member, is to suspend him for non-payment of dues?

A. Yes, after ninety days we suspend them for non-payment of dues.

Q. That is the practice that is followed with all the members, is that correct?

A. That is right.

Trial Examiner: In the dispatch of work, if a man is suspended, is he treated as a member or non-member?

The Witness: Say, if he was 90 days in arrears and he came in and promised to straighten up, he would be.

Trial Examiner: I mean a man who is suspended, period, he has promised nothing, is he treated as a member or a non-member?

The Witness: If he had been a member, we would treat him as a member; as long as he was

(Testimony of Robert Buchanan.)

a well qualified workman, we would dispatch him out.

Trial Examiner: Even though he was suspended?

The Witness: Yes.

Trial Examiner: But suppose there was a member in good standing [156] in the hall when the job comes up, which one would you dispatch?

The Witness: In that case, we would dispatch the one we thought was best qualified, who would fill the bill, without distinction as to the member or non-member.

Trial Examiner: Is there a distinction between a member and a non-member, then?

The Witness: Yes. Well, the suspended members, some of them we know, if they have been in there, we know from a particular time; a non-member, we don't know what they are or what their qualifications are. [157]

* * * * *

Trial Examiner: The question is, however, whether Mr. Lewis had been there before May 9, 1956.

The Witness: Oh, yes, he had been there before May 9, that is correct.

Q. (By Mr. Jackson): But there had been no work to dispatch him on, even if he had asked for it, is that correct? A. That is correct.

Q. Then, as I understand, this work for Mr. Nielsen, that was a job for a subcontractor who

(Testimony of Robert Buchanan.)

was in the moving business? Is that my understanding? [158]

A. That was a subcontract from a subcontractor, a subcontract from the Iverson Wrecking Company. They had the original contract.

Q. He had gotten a job with Mr. Nielsen in moving work?

A. Helping to jack the house up.

Q. They had gotten a job over on the Teamsters' Hall?

A. Teamsters' Hall, that is right, yes.

Q. Then I believe, as I understand you to say, on May 17, then, Mr. Lewis came in, and I believe on the 16th he had come down and registered that he wanted to be a hod carrier?

A. That is right.

Q. In other words, he didn't want to go out on a classification as a common laborer?

A. He didn't want to go on the list, he wanted to go on the mental list, whatever you would call it, or the hod carriers' list.

Q. To your knowledge, had he had hod carrying experience? A. Oh, yes.

Q. So he was given the privilege of working out as a hod carrier and he was dispatched out, is that correct?

A. Yes; that was a few days later.

Q. Is it essential that the men determine whether they want to be on the common laborer list down there or whether they want to be on the hod carrier list?

(Testimony of Robert Buchanan.)

A. They determine that themselves, they have to stay on one. [159]

Q. They can't move back and forth from one to the other? A. Yes, that is right.

Q. Following the May 17—or let me ask you this, how long did you remain there then as the financial secretary?

A. About six weeks, five or six weeks.

Q. When did you leave?

A. I left the last week in June.

Q. The last week in June? A. Yes.

Q. That is, you retired at that time, as I understand it? A. Yes.

Q. I believe Mr. Allman took over your work as the financial secretary?

A. That is corrrect.

Q. And up until the time you left was Mr. Lewis being dispatched out when work was available? A. I understand he was, yes.

Q. Let me ask you, Mr. Buchanan, Mr. Boyd asked you, following this dispatch work or the dispatching of Mr. Lewis on or about May 17. After that work was completed he came back, I believe you said he came back into the hall and you had some conversation with him. I would like to ask you this, did you have some conversation with him as to his request to become a member again? Do you remember that?

A. Yes, he said he would like to become a member again. [160]

Q. Is that when you had this discussion regard-

(Testimony of Robert Buchanan.)

ing the fact that he had filed this charge against the union and before he could become a member, why, he would have to withdraw the charge?

A. That is correct.

* * * * *

Q. (By Mr. Jackson): Let me ask you this, Mr. Buchanan. Where you have disputes with suspended members regarding their going to work, is there certain grievance procedure that [161] you have set up within the union that the member or former member must follow in order to be reinstated?

A. Yes, that is, if there is some question it is referred to the executive board, who are members of the organization.

Q. If a person has a suit pending or charge pending against the union, what is the union's consideration with reference to that particular member? Do they have to withdraw the charges before they can be considered for membership?

A. That is the practice, yes.

* * * * *

Trial Examiner: I will sustain the objection.

Q. (By Mr. Jackson): Mr. Buchanan, did you have any discussion with Mr. Lewis on or about May 17, 1956, after he had been [162] dispatched to his first job, when he came back into the union hall, about his becoming a member of the union?

A. That is correct, yes.

Q. Would you tell us now just exactly what was said between you and Mr. Lewis with respect to his

(Testimony of Robert Buchanan.)

becoming a member and what, if anything, he may have to do in order to become a member of the union again?

A. Yes. I believe I told him what he ought to do is withdraw his charges and come down and take his turn along with the rest of the hod carriers.

Q. Do you remember what he said about withdrawing the charges that he had filed against the union at that time?

* * * * *

A. I believe he said he would have to consult someone about it first before he would do it.

* * * * *

Q. To your knowledge, the charges were never withdrawn by Mr. Lewis?

A. That is correct. [163]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Boyd): Before this problem arose with Cyrus Lewis, he was not being given a number down there at the union hall this year, was he?

A. No, he was on the different, he was, preferred to go as a hod carrier, which had no number, that is right, but he had that preference to go on the list, I had Mr. Allman tell me.

* * * * *

Q. To be clear on one other thing, at the time you talked with Cyrus after he had the Landrus job and came back there, did you not say to him at that time, "You realize this suit [167] won't be up for three months"? A. That is right.

(Testimony of Robert Buchanan.)

Q. "It will be two or three months before a hearing. If you want to work out of here, you withdraw the suit"? A. Yes, I told him that.

Q. And that didn't have any relation at all to his membership, it had relation to him withdrawing the suit, didn't it?

A. Also becoming a member, if he would withdraw the suit he would become a member, too.

Q. In other words, he had to become a member before he could be dispatched out of there without discrimination? A. No, no, no.

Q. Well, under what circumstances? He would fall into the non-membership group, wouldn't he?

A. Group, and say they would call for hod carriers, Mr. Lewis would be dispatched along with the rest, as long as he, as long as the employment was available, yes, we would have dispatched Mr. Lewis out.

Q. He would be dispatched after the members had been dispatched out? A. That is correct.

Q. He would be dispatched with the non-members? A. Yes.

Trial Examiner: As a hod carrier?

The Witness: Yes. [168]

Trial Examiner: Do I understand you dispatch members before you dispatch non-members in the hod carrier classification?

The Witness: That is, we dispatch the members first, we dispatch the members first because they have preference, we might as well make the record straight.

(Testimony of Robert Buchanan.)

Trial Examiner: Is there anything else of this witness?

Recross Examination

Q. (By Mr. Jackson): During the time that you were there between May and June 30, in the jobs Mr. Lewis was dispatched to, were any of these employers by whom he was employed members of the A.G.C.?

A. No, they were all of them small subcontractors, none of them members of the A.G.C.

Q. Were any of them doing business in interstate commerce?

A. No, subcontractors, plasterers and bricklayers, very few of them doing interstate commerce work. [169]

* * * * *

Further Redirect Examination

Q. (By Mr. Boyd): First, Mr. Jackson referred to contractors to whom Lewis was referred. Now, in your testimony up to this point you have identified only one job to which he was referred, namely the job with Landrus out at the Sand Point Country Club district. Did you know that at a later date he was sent out on another job?

A. Yes, I believe he was sent out for——

Q. And that was to work for Chris Berg, wasn't it?

A. I don't know whether it was for Chris Berg —was it for Chris Berg? That is what I couldn't say. Mr. Allman would know the answer, who he was dispatched to.

(Testimony of Robert Buchanan.)

Q. Isn't it a fact that you know that Chris Berg is a member of the Seattle A.G.C. and does do work in Alaska?

A. That is what I meant when I said people who go to work in Alaska, Mr. Berg does do work in Alaska. [171]

* * * * *

ALBERT NIELSEN

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Will you state your name and your occupation? A. Albert Nielsen.

Q. And your occupation?

A. Housemover.

Q. On May 9th of this year were you engaged in any housemoving work? A. Yes, I was.

Q. Where?

A. Well, as I recall, at the Teamsters' building. I don't have the correct address on it. [180]

* * * * *

Q. In the course of that day, Mr. Nielsen, did you employ any persons to perform common labor?

A. Yes, I did.

Q. And how many?

A. There was two boys that came along who wanted to work, and at that time I needed two men for the rest of the afternoon, and those boys hit me for work, they asked me if I had a job for them, so I put them to work.

(Testimony of Albert Nielsen.)

Q. Do you recognize Cyrus Lewis as being either of those two men?

A. That is one of them, yes.

Q. What transpired in the latter part of the afternoon with respect to their employment?

A. Well, along towards evening, I would say about 3:30 or a quarter to four, the union man came along and told me to let them go because they weren't union men.

Mr. Boyd: Would you read the answer, Mr. Reporter. I didn't hear it plainly. [181]

(Answer read.)

Q. (By Mr. Boyd): What was the full statement as to what would happen if you didn't let them go?

A. I just don't remember. That has been quite awhile ago.

Q. Specifically, was there any reference to picketing?

A. Yes, he said if I didn't keep straight union men on the job they would throw a union picket line on it, which we did, we kept union men on.

Q. I direct your attention to Bob Buchanan over here, the man seated the farthest there, he is to the right. Do you recognize him as the man who came over and talked to you that day?

A. Yes, it was Mr. Buchanan who came over and talked to me.

Q. Was it as a consequence of that that you let Lewis go that day?

A. Yes, I did. And furthermore, I had just

(Testimony of Albert Nielsen.)

planned on keeping them on that particular job, just that time, because we just needed the men for that half a day.

Q. Did you find Lewis a satisfactory workman?

A. Yes, I did. [182]

* * * * *

Trial Examiner: What was the scheduled quitting time?

The Witness: At 4:30, we quit at 4:30. The rest of the boys went home, so I let these fellows go, paid them and let them go. [183]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Jackson): And he never sought you out for any further employment?

A. No, not that I can recall anyway. [185]

* * * * *

Trial Examiner: Are you a member of any association of contractors?

The Witness: No. [187]

* * * * *

Mr. Boyd: We are in no position to prove that the operations of this employer affected commerce. This is adduced as the first incident in a chain of events that we are about to develop from other witnesses.

Trial Examiner: All right, now, that I may understand you, are you contending that this was discrimination under the terms of this contract?

Mr. Boyd: It was not discrimination under the terms of the contract, although it is discrimination,

it was not discrimination that was prohibited by the Taft-Hartley Act because the employer's operations don't affect commerce. [189]

* * * * *

CYRUS LEWIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Boyd): And where do you live?

A. I live at 1811 East Madison.

Q. You are colored? A. Yes.

Q. What is your age? A. Fifty-two.

Q. What was the extent of your education?

A. About second grade.

Trial Examiner: Of grammer school?

The Witness: Second grade, grammar school.

Q. (By Mr. Boyd): What is your occupation?

A. Hod carrier.

Q. For how many years?

A. Oh, about 20 years. [204]

* * * * *

Q. Did you get any work in April through the union hall? A. No.

Q. Did you go there for work? A. Yes.

Q. How frequently did you go there?

A. I went there two or three times a week.

Q. On each occasion when you got there what did you do when you went to the union hall?

A. I told them I was inquiring for work. [207]

(Testimony of Cyrus Lewis.)

Q. What response did you get?

A. They kept telling me there wasn't anything and they weren't taking any members.

Trial Examiner: I didn't get the last. What did you say?

The Witness : They weren't taking any members in.

Trial Examiner: Did you make an application for membership?

The Witness: I tried to.

Mr. Boyd: I will state that. But before doing so, let me pass to one other thing.

Q. (By Mr. Boyd): Up until the time when you filed this charge on May 11, Cyrus, were you sent to any work by the union? A. No.

Q. Between the period when you first started looking for hod carrier work this spring and up to the time when you filed the charges did you get any hod carrier work? A. No.

Q. Did you from any other sources get any job as a hod carrier? A. No. [208]

* * * * *

Q. (By Mr. Boyd): Mr. Lewis, how long was your work with Landrus?

A. Three days and a half.

Q. You say you went out on May 17?

A. Yes.

Q. Did you go to work that day? A. Yes.

Q. And then you worked the 18th, on Friday?

A. Yes.

Q. And the following Monday and Tuesday?

(Testimony of Cyrus Lewis.)

A. Yes. [223]

* * * * *

Q. May 18 you went to the Union Hall. You were working out on the Landrus job?

A. I mean, I am talking about, after I finished the job. It must have been May 21 or May 22, because to the best of my recollection it was after he finished the Landrus job when it first was mentioned to me about withdrawing the case.

Q. About withdrawing the case? A. Yes.

Q. But were you at that time talking about joining the union or getting another job, when you went to the union at that time, did you go at that time, in May, for the purpose of getting another job or for the purpose of joining the union? Which was it? [231]

* * * * *

Q. (By Mr. Boyd): Talking about your conversation on June 21, that was when Leo said to you—first, you say on June 21 you said you were talking about re-instating. Did you have any money with which to re-instate? A. Yes.

Q. Where did you get that money?

A. Off of this job where I was working.

Q. Off the Berg job? A. That is right.

Q. Did you tender the money to Leo?

A. Yes. I walked up to the window and offered to pay him some money and he wouldn't accept it.

Q. And his statement to you at that time was what, now, so that we will be clear? [232]

* * * * *

(Testimony of Cyrus Lewis.)

A. When I went off of the Berg job I went down and tried to reinstate myself with the union, pay some dues, and to the best of my recollection he told me, he said, "No, I am not going to take your money until I get a statement from the Board that you have withdrawn the case."

Trial Examiner: Tell me, how much money did you have?

The Witness: I had $40 at that particular time.

Trial Examiner: Is that what you tendered to him?

The Witness: I had $40, expecting to pay $37.50. That is what the—that is what I learned, I mean the new, the initiation fee was, or whatever—no one had told me anything about what I had to pay, which I had been trying to pay, no one had told me what I had to pay, but from talking with different hodcarriers I learned the fee was $37.50. That is what I had the $40 in my pocket for.

Trial Examiner: Initiation fee?

The Witness: Yes, to reinstate, and I felt like I had once been a member and I just wanted to reinstate or do whatever I could towards the right thing, and I had $40 in my pocket at that particular time for that use, and I offered to pay it.

Q. (By Mr. Boyd): You have been testifying about June 21. Did you get any other work from the union or through the union in the month of June?

A. Yes.

Q. Stop and think and tell me where you got it, where you worked.

(Testimony of Cyrus Lewis.)

A. Well, after I finished the Chris Berg job, then the next job I got was working for Frodesen.

Q. When did you start on that work?

A. I started to work for Mr. Frodesen about June 10.

Q. Let's see is we can assist your recollection. I will hand you here a group of copies of your payroll slips and direct your attention to the fact that the last one was dated August 6, 1956, and the first one was dated July 13, 1956, for 16 hours' work, and that was for the week ending July 11. Does that refresh your recollection as to when you started working for Frodesen?

A. I started working for Frodesen on the 11th.

Q. If you had 16 hours, then, on the 11th, you actually started on the 10th, didn't you, the 10th of July? A. Yes.

Trial Examiner: How did you get that job?

The Witness: I got it through the union.

Trial Examiner: As a hodcarrier?

The Witness: Yes.

Trial Examiner: Who gave it to you?

The Witness: Leo.

Trial Examiner: Did you have any conversation with him [234] at that time?

The Witness: No.

Q. (By Mr. Boyd): Is it clear in your recollection now that your work with Frodesen started on July 10? A. That is right.

Q. At the time you started out on that job,

(Testimony of Cyrus Lewis.)

was anything in particular said to you by Leo at the time he gave you the referral?

A. No, not at all.

Q. Your payroll slips indicate that that work continued from July 10 up to August 6?

A. That is right.

Q. August 6 being on a Monday?

A. That is right.

Q. Actually did you leave that project on that day? A. No, I didn't.

Q. What did you do for the balance of that day?

A. I got laid off of Frodesen's job at 12 o'clock that Monday and I worked for Ruddy Valle.

Mr. Boyd: The name is Henrick Valle.

Q. (By Mr. Boyd): Is that correct, Henrick Valle?

A. Yes. And I worked for him for one day and a half.

Q. So you worked for him a half day on Monday and a full day on the 7th of August?

A. That is right. [235]

Trial Examiner: Did you get that job through the union?

The Witness: No.

Q. (By Mr. Boyd): But in the course of the time that you were working on that job did you see any official there from the union? A. Yes.

Q. Who was it that you saw on that job?

A. I guess I am right about the name. I think

(Testimony of Cyrus Lewis.)

it was Mr. Earl something. A little fellow, a short fellow.

Q. Did he make any objection to your being, working, on the Valle job without a dispatch?

A. No.

Q. Did you have any discussion with him about that? A. Yes; I told him about it.

Q. Having finished your work on this Frodesen and Valle jobs on August 7, what did you do after that?

A. After I finished that job I got laid off, and then I went back to the Union Hall.

Q. And when did you go back?

A. I went back to the Union Hall on the 9th—on the 8th.

Q. You went back the day after you were laid off the Valle job? A. On the 8th, yes.

Q. With whom did you talk?

A. I talked with Leo. [236]

Q. Do you remember what your conversation with Leo was on this particular day, August 8?

A. On August 8 I went down and talked to Leo and I told him I had finished that job and I would like to get dispatched out, and I offered to pay some money.

Q. And what did Leo say?

A. Leo told me, he said, "No, I am not going to receive any money from you until I get a letter from the big boys stating that you have dropped, that the case has been dropped."

(Testimony of Cyrus Lewis.)

Trial Examiner: Did he indicate to you whom he meant by "the big boys"?

The Witness: No. He just said, "a letter from the big boys"; that is all he said to me.

Trial Examiner: All right.

Q. (By Mr. Boyd): How soon after that, according to your recollection, is it, Cyrus, that you got further work?

A. Well, I got work pretty regularly then. The next job I went on, if I recall, was a job down on 1208 First Avenue, if I recall.

Q. I will hand you here, for the purpose of refreshing your recollection, if it will do so, I will show you this slip with respect to work while employed by Henry L. Mortensen. Looking at the slip itself, do you recall that that is the slip that you got with respect to this work that you were doing at that time? A. Yes. [237]

Q. That shows a date indicating that you worked there for a pay period ending August 24. Is that your recollection? A. Yes.

Q. During the time that you were working on that job——

Mr. Boyd: I withdraw that question.

Trial Examiner: Did you get this job through Leo?

The Witness: Yes.

Trial Examiner: And it was a hodcarrier's job?

The Witness: Yes.

Q. (By Mr. Boyd): Before asking you about anything that occurred on that job, let me direct

(Testimony of Cyrus Lewis.)

your attention to the week preceding that, the week before that. Did you have any contact with the union representatives the week before that?

A. You mean did I go to the Union Hall?

Q. All right, did you go to the Union Hall?

A. Yes, I went to the Union Hall.

Q. What day in the week did you go down there?

A. I went to the Union Hall from the time I finished the Frodesen job on the 6th, I went back, I mean on the 7th, I went back on the 8th, and I practically went every day until I got this job here.

Q. Let me hand you, to bring the matter into focus, let me hand you here a document, which for identification will be marked General Counsel's Exhibit No. 6. [238]

Trial Examiner: Yes, 6, that is right.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. Boyd): Handing you this slip marked General Counsel's Exhibit No. 6 for identification, can you state what that is?

A. When I was given this——

Q. (Interrupting) Were you given that piece of paper? A. Yes.

Q. And by whom? A. Leo.

Q. You identify this as being what it is and as being given to you by Leo? A. Yes.

(Testimony of Cyrus Lewis.)

Mr. Boyd: We will offer General Counsel's Exhibit No. 6 in evidence.

Mr. Jackson: What does it purport to be?

Mr. Boyd: You have a copy of it there.

Mr. Jackson: We have no objection.

Trial Examiner: It is received.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

Q. (By Mr. Boyd): Directing your attention to this, now, it has a date entered on it of August 18, 1956, and by reference [239] to the calendar August 18 fell on a Saturday. Keeping in mind the date of August 18, on Saturday, do you recall what took place on that day? A. Yes.

Q. Will you tell us about what took place on that day?

A. I went down to the Union Hall on August 18 to pay some dues, try to reinstate whatever they would let me do, like I had been doing, and that morning when I got there Leo—I walked up to the window and told him what I was there for, and he told me to come in the office. That was the first time I ever tried to talk to him. I went in the office and he went in the office and me and him lit up a cigarette together, and he says, "I'll tell you what I am going to do", he says, "I won't take any money", he says, "but I am going to fix you up a slip as good as a book from August 18 until September 18", and so he did. This is the

(Testimony of Cyrus Lewis.)

slip. And he says, "You keep that until August 18 and we will see what happens."

Trial Examiner: Until after August 18?

The Witness: Until after August 18, and we will see what happens.

A. (Continuing) Then I taken it. I referred to him again when I walked out, and I said, "I won't have to pay any money here on anything? My business here is to pay some money." And he said, "No, you won't have to pay a nickel."

Q. (By Mr. Boyd): Did anything else occur before you left? [240]

A. I and he shook hands. He shook hands with me and I shook hands with him, and he said, "No hard feelings", and I said, "No hard feelings", and I walked away.

Q. You quoted him a moment ago, "We will wait until after August 18 and we will see what happens"? A. I meant after September 18.

Q. Was there one other little thing that happened there? Was there something that happened about a button?

A. Yes. I asked him to give me a work button, and he gave me one.

Trial Examiner: What kind of a button is that?

The Witness: It's just a union button that everybody wears around.

Q. (By Mr. Boyd): You say you got that slip on August 18, which was on Saturday. In the week that followed that you have testified that you were working for this Mortensen in the week that

(Testimony of Cyrus Lewis.)

ended August 24, is that right? A. Yes.

Q. You say the work was where?

A. The work was at 1204 First Avenue.

Q. While you were working there did you have any contact with any union officials?

A. Yes.

Q. With whom? A. Leo. [241]

Q. What took place?

A. Well, when I was working there Leo came down on the job, him and some man. I don't know who this man was, but it was some man with him. And he called me in person and asked me about, asked me had I been up and withdrawed the case and what was I going to do about it, and I told him, I said, "Well, I don't know." I said, "I have called them up and tried to talk to them about it and they told me that they wouldn't withdraw it, that it was out of my hands at the time." And so his purpose was, the way I was understanding it, he was trying to get me to say that I would withdraw the case or withdraw the charge.

Q. You fix that as being sometime in that week that ended on August 24? A. Yes.

Q. Did you have any further conversation with any union official at any time about withdrawing the case? A. At another date, yes.

Q. Where were you working at that time?

A. I was working on the corner of Melrose and Oliveway.

Q. Do you remember who you were working for? A. I was working for Beck.

(Testimony of Cyrus Lewis.)

Q. I will hand you here pay slips which indicate that you worked for Lloyd E. Beck for a period beginning September 19 through September 28, 1956. Is that about the time that you were working there, according to your own recollection?

A. Yes.

Q. You say you talked with Leo when you were working on that job? A. Yes.

Q. Will you tell us now in detail what happened in that conversation?

A. Well, he came on the job and called me off in person again and asked me had I tried to withdraw this case, and I told him, I said, "Well, I have called them up and talked to them", which I hadn't, and he says—at the time I wanted to keep working. I didn't know whether he was going to pull me off the job or what. I stalled him off. And at the time he says, "Well, to prove to me that you have tried to withdraw the case or want to withdraw the case", he says, "will you sign a paper stating that you want to withdraw the case or will withdraw the case?" and I told him, I says, "I will tell you, when I talked to them they told me it was out of my hands," and "I would rather you would call up and talk to some officials up there, my lawyer or somebody, some official up there. There is nothing else I can do." So the conversation led on from one word to the other, but I guess then part of it was he was trying to get me to sign a statement that I would withdraw the case at that time.

(Testimony of Cyrus Lewis.)

Mr. Jackson: Well——

Mr. Boyd (interrupting): He is only reiterating what he [243] said.

Trial Examiner: I am going to strike this witness' supposition as to what Leo was trying to get him to do. [244]

* * * * *

Q. (By Mr. Boyd): You have in your testimony here recalled that August 8, when you went down to the Union Hall, you offered to pay dues, and at that time Leo told you that he wouldn't accept anything until he got a letter from the big boys? A. Yes.

Q. Do you recall that? A. Yes. [245]

Q. And you testified previously that on June 21, right after the Berg job, that you offered to pay dues, and at that time he said that he wouldn't accept them until he found out how the case came out or what was going to be done with the case?

A. That is right.

* * * * *

Q. (By Mr. Boyd): My question to you, Mr. Lewis, was this, while previous to that time, while before that time, there were incidents when you offered to pay dues. At those previous [246] times when you offered to pay dues, which was actually back in before you filed the charge, when you were working for Metropolitan Builders——

A. Yes.

Q. (Continuing) ——was anything said at that time about withdrawing the charges?

(Testimony of Cyrus Lewis.)

A. No. There wasn't any charges at that time. If I understand you right, back in the time I worked for Metropolitan Builders, there wasn't any charges then.

Q. Then when you got the Landrus job in May, that is the first job they sent you out on?

A. Yes. [247]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Jackson): I see. You didn't call Nielsen up that night or the next day to see whether or not he had any further work that he hadn't told you about? A. No.

Q. I think you said that he asked you to call him up that night or the following——

A. (Interrupting) He did ask me, but I didn't.

Q. Then on the 10th you say you didn't do anything?

A. To the best of my recollection I don't think I did anything on that next day. [263]

* * * * *

Q. Do you know, Mr. Lewis, during the month of May, of any job prior to the time you filed this charge? Do you know of any job that the union could have sent you on that was available?

A. Yes.

Q. What job do you know that was available?

A. I don't know where the job was or who had had jobs, but I know there was jobs they could have sent me on.

Q. But you don't know the name of any em-

(Testimony of Cyrus Lewis.)

ployer to whom they could have sent you on a job?

A. No, I don't; I don't know that, but——

Q. (Interrupting) That was my question, now.

A. Yes.

Q. You don't know the name of any employer to whom the union could have sent you during the month of May up until the time you filed the charge, is that correct?

A. You mean from the month of May up until the time I filed [264] the charge?

Trial Examiner: No. Counsel means in the month of May up until the time you filed the charge, up to May 11, until May 11, do you know of any employer that the union could have sent you to that it didn't send you to.

The Witness: No, I don't.

Q. (By Mr. Jackson): During the month of March or April, 1956 do you know the name of any employer that the union could have sent you to, during those months, for employment?

A. No. If it didn't, I would have went to work myself, if they would have hired me.

Trial Examiner: You have answered the question.

Q. (By Mr. Jackson): If you had known where you could have gotten a job during March and April, 1956, you would have gone there to find that job, wouldn't you? A. Yes.

Q. But you didn't know of any work that was available where you could go and get a job during March and April of 1956, is that correct?

(Testimony of Cyrus Lewis.)

A. No. [265]

* * * * *

Q. Do I understand, then, Mr. Lewis, you have been working during, I believe, May, June, and July, August, and down to the present time, you have been working as a hodcarrier, is that my understanding?

A. Yes, I think my first job was in May, if I remember right.

Q. When you finish one job—strike that. [266] Have all the jobs you have been getting since May been obtained through the Union Hall, that is, Local 242? A. Yes.

Q. Have you gotten any jobs for yourself?

A. No.

Q. You haven't solicited any jobs for yourself, is that correct? A. No.

Q. Have you been working during the month of October?

A. Yes. To the best of my knowledge, if you will give me time to think—yes, I think I have.

Trial Examiner: On a job out of the Union Hall?

The Witness: Yes, it was a job out of the Union Hall.

Trial Examiner: Have you worked the whole month?

The Witness: No. I worked for—well, I can't think of the man's name, but I worked this month because I finished this past Tuesday. I can't recall his name, but I did work this month.

(Testimony of Cyrus Lewis.)

Trial Examiner: The entire month?

The Witness: No. I think I worked eight days for them, for this person.

Mr. Boyd: For the record, and to shorten it, Mr. Lewis would concur, I am sure, that since the issuance of that slip on August 18 he does not claim that he was discriminated against in the dispatching of work. [267]

Trial Examiner: What's more, you don't claim it, you don't claim that he was discriminated against?

Mr. Boyd: We do not claim that, either, that there has been any discrimination, in fact, since the issuance of the slip on August 18.

Q. (By Mr. Jackson): Have you had more work since August 18 than you had before August 18? A. Yes.

Q. Has there been more work available in the City of Seattle than prior to August 18?

A. I can't answer that.

Q. You wouldn't know that?

A. I wouldn't know that, no, sir.

* * * * *

Q. Mr. Lewis, during the month of July, 1956, do you know of any jobs that were open during the month of July that the union could have sent you on? [268]

* * * * *

The Witness: I don't know.

Q. (By Mr. Jackson): During the month of June do you know of any jobs that the union could

(Testimony of Cyrus Lewis.)

have sent you on? A. No.

Q. During the month of August, down to August 18, when Mr. Allman gave you this slip that has been referred to here, you know of any jobs in the early part of August, between August 1 and August 18, that they could have sent you on?

A. I didn't know of any. But they sent me on some.

Trial Examiner: Well, counsel is referring to jobs they could have sent you on that they didn't send you on. That is the question.

The Witness: I don't know.

Trial Examiner: If you don't know, as I said before, you don't know.

Q. (By Mr. Jackson): Also in the month of May, Mr. Lewis, May, 1956, do you know of any jobs that the union could have sent you on during the month of May that they didn't send you on?

A. No.

Trial Examiner: When did this Todd job come up that you referred to, in what month?

The Witness: I think it was May 17.

Trial Examiner: All right.

Q. (By Mr. Jackson): You say May 17. You understand there was a job at Todd's. Is that my understanding? A. Yes, sir.

Q. You don't know whether Todd's called for a special hodcarrier on that job or not, do you?

A. No, sir.

Q. And you had no discussion with the union about the Todd job? A. No. [270]

* * * * *

Mr. Boyd: And we say the system was the causation. We [276] are unable to trace, for remedy purposes, at this juncture we are unable to trace what jobs he could have had, but we say the system operated discriminatorily, therefore there was a causation. [277]

* * * * *

Trial Examiner: All right, gentlemen, I am prepared to pass on your motion to strike Mr. Nielsen's testimony. I am going to deny the motion. The testimony does not go to establishing that Nielsen discriminated against this witness within the meaning of the Act. I am retaining the testimony as evidence of a policy that the union had toward this witness, as evidence of a discriminatory policy toward him. That is the reason for the retention of the testimony. [281]

* * * * *

LEO ALLMAN

a witness called by and on behalf of the respondent union, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Jackson): Would you state your name. A. My name is Leo Allman.

Q. And where do you live, Mr. Allman?

A. At 810 West McGraw Street.

Q. What is your business?

A. I am financial secretary for Local 242.

Q. How long have you held that job?

A. Since the last day of June this year.

Q. Prior to that time what was your job?

(Testimony of Leo Allman.)

A. I was dispatcher and corresponding secretary. [282]

* * * * *

Q. Are you acquainted with Mr. Cyrus Lewis?

A. Since this year, yes.

* * * * *

Q. What was the nature of this, how did you make his acquaintance?

A. He appeared at the office seeking work.

Q. Do you remember about when that was?

A. Well, it was early spring.

Q. Would that be about March?

A. Around March, I would say.

Q. And did you discuss with him what kind of work he was looking for?

A. Well, he told me he was looking for a hod carrying job. [283]

* * * * *

Q. When he first talked to you it was about obtaining a job as a hod carrier?

A. That is correct.

Q. What did you tell him at that time?

A. I told him that, if I remember correctly, at that particular time there was no work.

* * * * *

Q. Yes. You might explain the industry and how it works as far as hod carriers are concerned, what times of the year there is employment and what times there isn't, if that is true.

Q. The only way I can explain it is this, as a general rule in the winter you have so much rain,

(Testimony of Leo Allman.)

the ground is so wet, the moisture content is such that you cannot excavate for basements. Consequently your construction work, that is, new construction, is practically at a standstill until the ground dries up to where you can move equipment in and get at your excavation. You have the period of time after your excavation until your structure is built. During that period of time there [284] is always a slack time for plaster tenders, brick tenders, until your new construction is well on its way.

Trial Examiner: When is that?

The Witness: As a general rule, it is the last part of May, first part of June. It takes approximately, it is approximately 60 days from the time they get excavated, sometimes 60, sometimes 90, until they can do brickwork or plaster.

Q. (By Mr. Jackson): Is it reasonable to say, then, during the months of March and April up until the middle of May the work for hod carriers is very slack? A. That is correct, yes.

* * * * *

Q. Let's take a typical year in the course of the month of March, 1956. How many men would you have around the hall during a typical, average day who were seeking work, men unemployed and seeking work? [285]

A. Altogether, counting hod carriers and laborers, during the month of March and pretty near any particular year, you would have 75 to 80 men. That is conservative.

(Testimony of Leo Allman.)

Q. In dispatching, would you dispatch both laborers and hod carriers?

A. As a general rule.

Q. Would the men wait there — what is their practice, they come there and wait around the hall seeking employment? A. That is right.

Q. And how long do they generally wait there after arriving in the morning?

A. Well, the laborers, as a general rule, that is, the construction laborers, as a general rule, will stay there until approximately noon. The hod carriers generally stay there until 9 or 10 o'clock and then they shove off.

Q. Following, then, you might just tell us in your own words what your experience was with Mr. Lewis with reference to your ability to place him on any work and whether he was offered other work than that of a hod carrier.

A. I offered Mr. Lewis the opportunity of going on the laborers' list for this reason——

Trial Examiner: When was this?

The Witness: Well, I don't recall whether, I believe we offered him the opportunity of going on the laborers' list this spring, around in April, and I know I offered him a job as [286] a laborer approximately a month ago down here for Austin Construction Company.

* * * * *

Q. (By Mr. Jackson): He was seeking a job as a hod carrier. Did you have unemployed hod carriers there in the hall during the month of March?

(Testimony of Leo Allman.)

A. Oh, yes, that is correct.

Q. Did you have them there during the month of April? A. That is correct.

Q. When he came in during the month of March and April was there any work available as a hod carrier that you could have [287] sent him to?

A. No, sir.

Q. I believe you said in April you offered him a job as a laborer, and what was his reaction when you offered him a job as a laborer?

A. If I remember right, he told me he was a hod carrier and he preferred to go out as a hod carrier.

* * * * *

Q. (By Mr. Jackson): Mr. Allman, you told us that you had offered Mr. Lewis an opportunity to go out and work as a laborer. Do the laborers have a separate category in the union from the hod carriers? [288] A. That is correct.

Q. Do you have a separate list that you put the laborers on who are seeking employment, as compared to hod carriers?

A. You register the laborers; the hod carriers you keep track of them in your head by the district they live in, the length of time they have been out of work.

Q. But you don't have any separate list for hod carriers? A. No, sir.

Q. I believe Mr. Buchanan testified there were about 70, you had about 70 hod carriers enrolled there, or who worked out of the union.

(Testimony of Leo Allman.)

A. I would say in that vicinity, yes.

Q. And about 1,700 laborers. A. Correct.

* * * * *

Q. Were there jobs as a laborer that you could have sent him out on if he had wanted to go out as a laborer? A. Yes.

Q. Up until the 11th of May 1956 were there any hod carrier jobs available in the union that had come up when he came down, any particular day that he had come down there [289] seeking work, were there any hod carrier jobs available that you could have sent him out on?

A. I don't believe so, sir.

Trial Examiner: Actually, do you know?

The Witness: Well, as I said before, the work was pretty scattered, contractors were calling their own men back. As far as there was any work, no.

Q. (By Mr. Jackson): Do you have any recollection now of any time during March and April and up to the 11th of May that there were any hod carrier jobs available in the union office on any one of those mornings that Mr. Lewis came in seeking work as a hod carrier? A. No, there wasn't.

Trial Examiner: Did you send any people out on those days?

The Witness: Men that the contractors, just like I stated before, the contractors were calling their men back that had worked for them before, they were calling up and wanting to know their addresses or phone numbers so they could call them back to work.

(Testimony of Leo Allman.)

Trial Examiner: I am not referring to that. Did you send any man out?

The Witness: No, sir.

Trial Examiner: Or did the union dispatch any men to any jobs on any day when Mr. Lewis was in the office in the period mentioned by counsel, looking for a job as a hod carrier? [290]

The Witness: No, sir.

Q. (By Mr. Jackson): That is up to May 11, 1956, is that correct? A. Yes, sir.

Q. I believe Mr. Lewis said that he was in the office on May 9 seeking work. Was there any work as a hod carrier, to your knowledge, in the union office on May 9?

A. It's pretty hard to remember these dates that far back.

Q. That was the day that he went out to, if you will recall his testimony, that he went out and worked for Mr. Nielsen, and got this job.

A. No, sir.

Q. Your answer is that there were no hod carrier jobs available that morning?

A. That is correct.

* * * * *

Q. When did the hod carrier jobs in the union office start opening up in 1956? When was the first available jobs that you had for the hod carriers, that you could send out?

A. Well, as far as I can remember, Mr. Lewis went out on about the first job I had.

Trial Examiner: That isn't the question. Counsel

(Testimony of Leo Allman.)

asked you — perhaps you will come to the other thing later — when did the jobs start opening up? That is all he wants to know at the [291] present time.

A. In May of this year.

Q. (By Mr. Jackson): About what time?

A. I would say around the middle part of May.

Q. Do you remember about the first job that opened up where you had a demand for hod carriers?

A. Approximately the first — you are talking about plaster jobs, I imagine?

Q. Which he would qualify for.

A. Well, I think the first job I got in was for a man by the name of Marius Landrus in the vicinity of, I don't remember the exact address, it was, I believe, on Ninety-fourth close to Sand Point Country Club.

Q. Was that a job Mr. Lewis was sent out on?

A. Yes, sir. [292]

* * * * *

Q. (By Mr. Jackson): Was there anything done by you or Mr. Buchanan there in the union office, between the months of March and April and up to May 11th—— A. No, sir.

Q. Just a minute, now. (Continuing) ——that in any way prevented Mr. Cyrus Lewis from getting a job from the union? [295]

* * * * *

A. No, sir. [296]

* * * * *

(Testimony of Leo Allman.)

Q. I say, is there anything that you or Mr. Buchanan did in the office there at the union during those months, from March up until June 30, that prevented Mr. Lewis from obtaining a job through the union as a hod carrier?

A. Not that I know of, no, sir.

Q. You said jobs began opening up around the 15th or after the 15th of May, 1956, and then Mr. Lewis was sent out on a job about May 17, 1956. Following that, was he referred out to jobs as a hod carrier when jobs were available in the union office?

A. Yes, sir.

Q. Has he been referred to jobs as a hod carrier since that time up to the present? A. Yes, sir.

Q. I believe you said that employers who used hod carriers had called in to the union and asked for special men. A. That is correct.

Q. What has been the practice of the union when they ask for a man by name? [297]

A. To send him out.

Q. Has that practice been in existence ever since you have been there at the union?

A. Ever since I have been in office, yes.

* * * * *

Q. Do you remember the testimony of Mr. Lewis with respect to a job he testified to here this morning which he claimed had come in from Todd's Shipyard, seeking a hod carrier?

A. Yes, I believe I do.

Q. Do you remember that occasion?

(Testimony of Leo Allman.)

A. I remember the occasion. I couldn't tell you the date, by any means.

Q. Would you tell us what the job was for.

A. The job was for a boiler aboard ship.

Q. What was the call for?

A. I believe Mr. Buchanan took the order, turned it over to me, and this was his words, he said that a contractor had called up and said he had four first-class hod carriers but they were all big, to send him a small man. May I go on? [298]

* * * * *

A. Down at the bottom of a boiler, especially these boilers, there is a small opening, what they call an acid hole. That is very small and it takes a very small man to get inside there. He has to take care of the bricklayer, after the bricklayer is inside, he has to give him the material. I am not a very big man myself, and at this present time I don't think that I could get in one of those holes. It takes a man of not much over a hundred and fifty pounds, or 155 pounds at the most, to be able to squeeze through there.

Q. (By Mr. Jackson): Then, when the call came in, this was a morning that Mr. Lewis has testified that a Mr. Johnson was sent down when this job came in from Todd's, to Todd's. Would you go on and explain whether or not Mr. Lewis had asked for the job and why you didn't give the job to Mr. Lewis.

A. Well, I didn't give the job to Mr. Lewis for this reason, that it took a small man to get into the

(Testimony of Leo Allman.)

boiler, as I stated before, and the contractor had specified that he wanted a small man, as I already stated, he had four men to take the material off of the ship into the hold, he needed a small man in the boiler to tend the bricklayers inside. That was the reason for Mr. Johnson's appointment to that job.

Q. How large a man was Mr. Johnson?

A. Do you want his height and description?

Q. Well, yes, give us his description, his weight and—— [299]

A. Well, I don't, Mr. Johnson is a man approximately five foot seven or eight, I imagine he is, I don't believe he would tip the scales at over 150 pounds at the most.

Q. That is, he is what you could call a small man?

A. He is what you would call a small, wiry man.

Q. As compared to Mr. Lewis, how do you classify Mr. Lewis?

A. Mr. Lewis would make two of him.

Trial Examiner: What do you estimate Mr. Lewis' weight to be?

* * * * *

The Witness: I would say he weighed around 225 pounds.

Trial Examiner: And you estimate his height was what?

The Witness: Well, I know he is taller than I am.

Trial Examiner: And you are what?

The Witness: I am six foot.

(Testimony of Leo Allman.)

Q. (By Mr. Jackson): Mr. Lewis has testified that you came out looking for a hod carrier that morning, out of the office looking for a hod carrier. Is that the reason that you came out looking for a hod carrier, you were looking for a small man?

A. That is correct.

Q. Then Johnson was dispatched to that job?

A. Yes, sir.

* * * * *

Trial Examiner: What was the reason you dispatched Mr. Johnson rather than Mr. Lewis?

The Witness: The contractor had asked specifically for a small man to get through this acid hole in the boiler.

Trial Examiner: And that was your reason?

The Witness: That is correct.

* * * * *

Q. (By Mr. Jackson): Mr. Allman, Mr. Lewis also stated that he had asked to join the union and that you had—I believe he said he had asked to join the union before he had filed the [301] charges and then he also asked to join the union after he filed the charges. Would you just tell us what the fact is regarding that and the reason, whether or not there is a reason why he wasn't permitted to be reinstated?

A. Well, yes, there is a reason. [302]

* * * * *

Q. (By Mr. Jackson): When he first came in, what month was it, to your knowledge, that he

(Testimony of Leo Allman.)

sought, asked you about joining the union, wanted to pay some dues, as he has testified?

A. The months, that is something I couldn't answer.

Q. Well, approximately when was it?

Trial Examiner: Was it before the charge was filed?

A. I don't know whether it was the last part of April or in May.

* * * * *

Q. (By Mr. Jackson): What was said, if you recall?

A. Mr. Lewis came in and wanted to rejoin the organization and, if I remember right, I told him that he would need his money to eat on, if I am not mistaken.

* * * * *

Q. Let me ask you this, were you taking any new members in during this slack period?

A. No, sir, we didn't have enough work for the —we didn't have any work. We had no work for new men. [303]

* * * * *

Q. When was the next time that you had any conversation with Mr. Lewis about becoming a member of the union? Was that after——

A. It would be after the charges were filed. [304]

Q. (By Mr. Jackson): I asked you if you had had any other discussions with Mr. Lewis about joining the union and you said yes, about the time that this slip was made out.

(Testimony of Leo Allman.)

A. On this date.

Q. On August 18. And what was your discussion at that time?

A. Mr. Lewis came down and wanted to join the organization. [305]

* * * * *

Q. And what was said, what happened then, what was said between you and him?

A. I asked him if he would withdraw the charges, that I would give him a card that was, that would act as a, to show my good faith, I would give him a card that would act as a book.

Q. And you gave him this slip?

A. That is correct.

Trial Examiner: Why would he need a book from you, to work somewhere?

The Witness: He seemed to want a union book. You don't need a union book to work anyplace.

* * * * *

Trial Examiner: And what was your answer to him when he asked you if he could join? That is the question.

The Witness: I asked him if he would withdraw the charges.

Trial Examiner: And what did he say?

The Witness: Well, that is quite a ways back. It is pretty hard for me to remember. [307]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Boyd): You referred to the slack period in the spring, when work was slack in the

(Testimony of Leo Allman.)

spring months of this year. May I restate the question, then. Such work as you had available to dispatch men to in hod carrier jobs during the slack months of this spring, where they were not being called for specifically by name, was given to the men who had full membership in your union, isn't that true?

A. I don't recall of any of them, any jobs coming in at that time that wasn't being called for by name, because the contractors were starting back to work.

Q. The Todd job was not called for by name, was it? A. Well, that was——

Q. The Des Moines job wasn't being called for by name, was it? [319]

A. No, sir, not those two.

* * * * *

Q. (By Mr. Boyd): But nevertheless, those jobs that you referred to in your testimony, the hod carriers were not called for by name, were they.

A. Which particular jobs was that?

Q. Where you sent a man to the telephone building at Des Moines and where you sent a man to the Todd Shipyard.

A. The transportation facilities enters into who went to Des Moines. And the size of the——

Q. (Interrupting) It is a matter of getting on a public bus, isn't it, to go to Des Moines?

A. How long does it take to go to Des Moines? Isn't it an hour and a half? [320]

* * * * *

(Testimony of Leo Allman.)

Redirect Examination

Q. (By Mr. Jackson): In sending men out to suburban areas, a lot depends on when the buses run, isn't that correct? A. That is correct.

Q. And the object is, when a man is dispatched in the morning, is to get him out there?

A. That is right.

Q. Is that correct?

A. That is our obligation.

Q. And it is a matter of dispatching the man that can get there the quickest?

A. That is correct.

Trial Examiner: Are you aware of any requirement of your union which requires you to give preference in dispatch to a member of the union over any non-member? [322]

* * * * *

The Witness: May I answer it in my own words?

Trial Examiner: Yes.

The Witness: In this respect, in your oath of obligation, it states in your oath of obligation that you will secure employment for union people above all others, I believe.

Trial Examiner: Were you complying with that obligation during the time that Lewis was applying for jobs?

The Witness: How do you mean?

Trial Examiner: Were you complying with this obligation that is imposed upon you?

(Testimony of Leo Allman.)

The Witness: It's the international constitution and you have no choice but to——

Mr. Boyd: That is to say, you had no choice but to comply with the requirements of the international constitution?

The Witness: Well, if you are going to be an official of the organization, you have to comply with the international constitution.

Trial Examiner: Let me ask you this, then. At any time when Mr. Lewis was in the office applying for a job, for dispatch, did you ever on any occasion dispatch a member in preference to him because Lewis was a non-member? [323]

The Witness: No, sir.

Trial Examiner: Did you have any occasion to do that?

The Witness: No, sir, not as I can recall. [324]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Boyd): But you did follow the past practice of the union of dispatching first your full members to such work as was available?

A. I followed the practice of dispatching the first man in, that is, the first man off of, out of work was the first man out.

Trial Examiner: However, what do you mean by "the first man"? Do you mean the first member or do you mean the first individual, irrespective of whether he was a member?

The Witness: I mean the first hod carrier out of a job was the first man out, to go to work.

(Testimony of Leo Allman.)

Trial Examiner: Well, weren't you following the international's constitution?

The Witness: What do you mean?

Trial Examiner: Doesn't the international constitution require you to give preference to a member, in dispatching him?

The Witness: I think that—I didn't say that I was putting out members before Mr. Lewis. I said that they were all taking their turn.

Trial Examiner: Whether or not they were members?

The Witness: If I remember correctly, there was only one other man around there who was working as a hod carrier, that [327] was not a member.

Trial Examiner: But my question is, were they taking their turns whether or not they were members or were they taking their turn as members and after you dispatched them, then you would send out the non-members? Which was it?

The Witness: They were taking their turn, period. [328]

* * * * *

Mr. Jackson: I think you said, though, "Didn't you know that during the months of May and June we had one of the driest summers up here that we have had for some period of time?" That, in substance, was what you said.

Trial Examiner: I was addressing myself to the heat, sir.

Mr. Jackson: That is the reason, as I say, all I

am trying to do is clarify it, if your Honor has that in mind, because June was a wet month here, and I submit, if June was a wet month, it would have some bearing on the hod carriers that would be working.

Trial Examiner: At the present time there is no evidence in the record either way because the witness, in effect, didn't know. [329]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 4

Western Washington District Council, International Hod Carriers, Building and Common Laborers of America—1956-1957-1958.

Agreement

* * * * *

Territory and Work Covered

5. This Agreement shall cover all Building, Heavy and Highway Construction in the following fifteen counties of the State: Whatcom, Skagit, Snohomish, King, Pierce, Thurston, Lewis, Pacific, Grays Harbor, Clallam, Jefferson, Mason, Kitsap, Island and San Juan.

Recruitment of Employers

6. To maintain employment, to preserve workable labor relations, to proceed with private and public work, the following accepted prevailing practices shall continue to prevail in the hiring of workmen:

(a) The recruitment of employees shall be the responsibility of the Union and it shall maintain

General Counsel's Exhibit No. 4—(Continued)

offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.

(b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.

(c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours, Saturdays, Sundays and holidays excluded, the Employer may procure workmen from other sources.

(d) Either party to this Agreement shall have the right to reopen negotiations pertaining to Union security by giving the other party thirty (30) days written notice, when there is reason to believe that the laws pertaining thereto have been changed by Congressional Amendments, Court Decisions, or governmental regulations.

* * * * *

34. For the good of the industry both parties pledge their immediate cooperation to eliminate any of the above mentioned possibilities and the following procedure is outlined for that purpose:

(a) In the event that a dispute arising on the job cannot be satisfactorily adjusted on the job between the Local or Locals involved and the Employer or his Representative, the same shall be referred to the Business Representative of the Dis-

General Counsel's Exhibit No. 4—(Continued)

trict Council and the Manager of the Chapter of the Associated General Contractors of America, Inc., in whose territory or under whose jurisdiction the dispute arises.

(b) Should the Business Representative of the District Council and the Manager of the Chapter in whose territory or under whose jurisdiction the dispute arises fail to effect a settlement, they shall refer same to a joint arbitration committee consisting of two members designated by the Employer, two members of the District Council. Should these four fail to reach an agreement, a fifth representative shall be chosen by them. Any decision of the Board shall be within the scope and terms of this Agreement. Decisions by this Board shall be rendered within twenty (20) days after the grievance is submitted to them.

(c) The parties hereby agree that such decision of the Joint Arbitration Board shall be final and binding upon both parties.

* * * * *

Schedule A

The Wage Rates in Schedule Below Shall Become Effective January 1, 1956, and Shall Remain in Effect Until December 31, 1957.

* * * * *

Mortarmen and Hod Carriers....2.67 2.81

* * * * *

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of: Mountain Pacific Chapter, Seattle and Tacoma Chapters, Associated General Contractors of America, Inc., and International Hod Carriers, Building and Common Laborers Union, Local No. 242, AFL-CIO, and Western Washington District Council, International Hod Carriers, Building and Common Laborers of America, and Cyrus Lewis, Cases 19-CA-1374, 19-CB-424 and 19-CB-445, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters,

/s/ By VERNON W. SELLER,
Field Reporter.

No. 15966

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC.; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER, INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO, and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,

Respondents.

Supplemental
Transcript of Record

Petition to Enforce and Petitions to Review Order of the National Labor Relations Board

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—10-31-58

No. 15966

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC.; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER, INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO, and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,

Respondents.

Supplemental
Transcript of Record

Petition to Enforce and Petitions to Review Order of the National Labor Relations Board

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—10-31-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1374

MOUNTAIN PACIFIC, SEATTLE, AND TACOMA CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

and

Case No. 19-CB-424

INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL No. 242, AFL-CIO,

and

Case No. 19-CB-445

WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,

and

CYRUS LEWIS, Charging Party.

CONSOLIDATED COMPLAINT

It having been charged by Cyrus Lewis, an individual, that the Respondents, Mountain Pacific

Chapter, Seattle Chapter and Tacoma Chapter of the Associated General Contractors of America, Inc., and International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act, 1947, 61 Stat. 136 (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, and Section 102.33, hereby issues this Consolidated Complaint and alleges as follows:

I.

(A) Mountain Pacific Chapter, Seattle Chapter and Tacoma Chapter of Associated General Contractors of America, Inc., referred to herein as the AGC Chapters, are corporate associations of employers that are engaged in construction work as contractors and have their principal places of business in the western part of the State of Washington.

(B) Mountain Pacific Chapter has its office in Seattle, Washington, and has members engaged primarily in highway and heavy construction.

(C) Seattle Chapter and Tacoma Chapter, respectively, have their offices in Seattle and Tacoma,

Washington, and each has members engaged primarily in building construction and in building specialty installations.

(D) The employer members of each of the AGC Chapters, by virtue of their membership therein, designate and authorize their respective chapters as their agents to negotiate collective bargaining agreements with labor organizations formed among employees in the building trades. These collective bargaining agreements prescribe the wages, hours and working conditions which are observed by the employer members of each chapter that is signatory to the agreement.

(E) Among the employers that comprise the membership of each AGC Chapter, (1) there are individual contractors who annually perform construction work valued in excess of $100,000 for business enterprises that annually produce and ship goods valued in excess of $100,000, and that annually provide services valued in excess of $100,000, which goods are delivered and services are performed at places outside the State of Washington. Additionally, (2) there are individual contractors who annually perform construction work at locations outside the State of Washington valued in excess of $100,000. Additionally, (3) there are individual contractors who annually perform services for the government of the United States, relating directly to the national defense, valued in excess of $100,000. The value of construction in each of categories (1) (2) and (3) above, performed an-

nually by the employers who collectively comprise each AGC Chapter, exceeds $10,000,000.

II.

(A) Each of the AGC Chapters, in negotiating for and agreeing to the collective bargaining agreements adopted by its employer members, is an agent of said employer members, and the AGC Chapter is thereby deemed an employer within the meaning of Section 2 (2) of the Act.

(B) The labor management relations and practices adopted for its employer members by each of the AGC Chapters affect commerce within the meaning of Section 2 (6) and (7) of the Act.

(C) Each of the AGC Chapters is an employer whose operations affect commerce within the meaning of Section 2 (6) and (7) of the Act.

* * *

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board, Region 19, 407 U. S. Courthouse, Seattle 4, Wash.

[Received in evidence as General Counsel's Exhibit No. 1-H.]

[Title of Cause.]

ANSWER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER

This respondent answers the Consolidated Complaint herein as follows:

I.

Answering Paragraph I, this respondent admits that Associated General Contractors of America, Seattle Chapter, Inc., is a corporate association of employers engaged in construction work as contractors, and this respondent has its principal place of business in Seattle, Washington. Among the activities of this respondent is included the negotiation by its Labor Committee on behalf of its members of collective bargaining agreements prescribing wages, hours and working conditions, which agreements are observed by members of respondent. Some of the members of this respondent association annually perform construction work in excess of $100,000.00 upon enterprises affected with commerce, and other members of this respondent do not engage in commerce or work affected with commerce, or engage in such work in amounts of less than $100,000.00 per year. Except as specifically admitted herein, this respondent denies the allegations in Paragraph I or denies that it has sufficient knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

* * *

IV.

This respondent admits that it participated in the negotiation in the year 1955 of an agreement effective January 1, 1956, with the council, and the agreement contained the clause quoted in Paragraph VI of the Complaint. Except as specifically admitted herein, the allegations of Paragraphs V and VI are denied.

* * *

LYCETTE, DIAMOND & SYLVESTER,

By /s/ LYLE L. IVERSON,
Attorneys for AGC, Seattle Chapter.

[Received in evidence as General Exhibit No. 1-J.]

[Title of Cause.]

Before the National Labor Relations Board

ANSWER OF MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS, INC.

Comes now the Mountain Pacific Chapter of the Associated General Contractors, Inc., and for answer to the consolidated complaint, admits, denies and alleges as follows:

I.

Pertaining to allegations of Paragraph II, denies the same.

II.

Pertaining to the allegations of Paragraph IV this answering chapter has not sufficient knowledge or information relative thereto to form a belief and therefore denies the same.

III.

Pertaining to the allegations of Paragraph VI, admits that the 1956 Agreement referred to therein, provides as therein set forth, but denies each and every other allegation therein contained.

IV.

Pertaining to the allegations of Paragraph VII this chapter denies that it has maintained and continued in effect the 1956 Agreement and on the contrary alleges that its activities for and on behalf of its members was limited to negotiating the original Agreement and that after the same was executed it had no further interest in and took no steps to enforce the same.

V.

Pertaining to the allegations of Paragraphs VIII, IX and X, the Mountain Pacific Chapter does not have sufficient knowledge or information by which to base a belief and therefore denies each and every allegation contained in said paragraphs.

VI.

Pertaining to the allegations of Paragraph XI, denies the same.

VII.

Pertaining to the allegations of Paragraph XII, the Mountain Pacific Chapter does not have suf-

ficient knowledge or information on which to base a belief and therefore denies the same.

VIII.

Pertaining to the allegations of Paragraph XIII and XIV, the Mountain Pacific Chapter denies the same.

By Way of Further Answer and as an Affirmative Defense to the matters set forth in the consolidated complaint, the Mountain Pacific Chapter of the Associated General Contractors of America, Inc., alleges as follows, to wit:

I.

That its activities relating to said labor agreement was limited to negotiating the original agreement but that after the same was signed for and on behalf of its members, it has taken no steps either to facilitate or enforce the same and in compliance therewith it is the sole responsibility of its members to deal with the union.

II.

That by reason of the fact that members of the Mountain Pacific Chapter are primarily engaged in highway and heavy construction work, its members have no occasion to and do not use Local No. 242 AFL-CIO of the International Hodcarriers, Building and Common Laborers Union of America, and that neither said chapter nor its members have any dealings or relations whatsoever with said local.

Wherefore, the Mountain Pacific Chapter of the Associated General Contractors of America, Inc.,

prays that said consolidated complaint be dismissed as to it.

/s/ WILBUR H. LAUDAAS,
Manager, Mountain Pacific Chapter of the Associated General Contractors of America, Inc.

ELLIOTT, LEE, CARNEY
& THOMAS.

By /s/ WM. P. CARNEY,
Attorneys for Mountain Pacific Chapter of the Associated General Contractors of America, Inc.

[Received in evidence as General Counsel's Exhibit No. 1-N.]

Before The National Labor Relations Board

[Title of Cause.]

ANSWER OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 242, AFL-CIO and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO

Comes now the above-named respondents and for answer to the Consolidated Complaint, admits, denies and alleges as follows:

* * *

III.

Answering paragraph III, respondents admit the same.

* * *

V.

Answering paragraph V, respondents admit that the Associated General Contractors Chapters entered into collective bargaining agreements, but denies each and every other allegation contained therein.

* * *

/s/ ROY E. JACKSON,
Attorney for International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO.

[Received in evidence as General Counsel's Exhibit No. 1-O.]

Before The National Labor Relations Board

[Title of Cause.]

ANSWER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

This respondent answers the Consolidated Complaint herein as follows:

I.

Answering Paragraph I, this respondent admits that Associated General Contractors of America, Tacoma Chapter, Inc., is a corporate association of employers engaged in construction work as contractors, and this respondent has its principal place of business in Tacoma, Washington. Among the activities of this respondent is included the negotiation by its Labor Committee on behalf of its members of collective bargaining agreements prescribing wages, hours and working conditions, which agreements are observed by members of respondent. Some of the members of this respondent association annually perform construction work in excess of $100,000.00 upon enterprises affected with commerce, and other members of this respondent do not engage in commerce or work affected with commerce, or engaged in such work in amounts of less than $100,000.00 per year. Except as specifically admitted herein, this respondent denies the allegations in Paragraph I or denies that it has sufficient knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

* * *

IV.

This respondent admits that it participated in the negotiation in the year 1955 of an agreement effective January 1, 1956, with the council, and the agreement contained the clause quoted in Paragraph VI of the Complaint. Except as specifically admitted herein, the allegations of Paragraphs V and VI are denied.

V.

Answering Paragraph VII, this respondent admits that the agreement of January 1, 1956, is still in effect. Except as specifically admitted herein, the allegations of Paragraph VII are denied.

* * *

LYCETTE, DIAMOND & SYLVESTER,
Attorneys for AGC, Tacoma Chapter,

By /s/ LYLE L. IVERSEN.

[Received in evidence as General Counsel's Exhibit No. 1-P.]

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119 NLRB No. 126-A

United States of America

Before the National Labor Relations Board

Case No. 19-CA-1374

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC., THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

and

Case No. 19-CB-424

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL No. 242, AFL-CIO

and

Case No. 19-CB-445

WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO

and

CYRUS LEWIS, Charging Party.

OPINION

On December 14, 1957, the Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondents had engaged in certain unfair labor practices and ordering them to cease and desist therefrom and to take certain affirmative action. Member Murdock dissented from that Decision and Order. However, the Board expressly provided that an opinion in this matter would issue at a later date. That opinion follows:

1. In the absence of any exceptions, we adopt the Trial Examiner's conclusion that the Respondent Union's threats and promises of benefits and

[1] 119 NLRB No. 126.

inducements to charging party Lewis to get him to withdraw his charge in this case violated Section 8 (b) (1) (A) of the Act.

2. The Employers named respondents herein are three chapters of the Associated General Contractors of America (AGC) in the State of Washington, who jointly with Western Washington District Council and Local 242 of the Hod carriers executed a contract containing, in pertinent part, the following provisions:

(a) The recruitment of employees shall be the responsibility of the Union and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.

(b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.

(c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours * * * the Employer may procure workmen from other sources.

The Respondents do not, nor could they argue that this contract does not make employment conditional upon union approval, for a more complete and outright surrender of the normal management hiring prerogative to a union could hardly be phrased in contract language. The fact that the agreement

limits the union's exclusive control to a 48-hour period after a request for employees is immaterial, for if unqualified exclusive delegation of hiring to a union is unlawful, the vice is not cured by a reversion back to the employer of the hiring priviledge after the union is unable to enjoy the power conferred upon it.[2]

The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring hall it contains. We hold the hiring hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring.[3]

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[2]In any event, in an industry like general contracting, characterized by short-term hirings of individual workmen who form a general pool of employees serving a large number of separate employers, control of the period immediately following the ever-rising need for new hirings is tantamount to perpetual control.

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[3]The Union admitted that in doing the hiring for the employers it always hires its members in preference to non-members, and that whenever a member is not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-union member to any assignment. If the contract were not unlawful on its face, we would deem the record as a whole ample to support a factual inference that the Employers in fact hired hod carriers and common laborers through this union hall and that the Respondents in fact hired such employees on behalf of the contractors in the closed-shop manner which the Union admitted.

Significantly, the contract is silent as to methods or criteria to be followed by the Union in performing its function as hiring agent. Under this contract and hiring hall, the Union is free to pick and choose on any basis it sees fit. Not only do the employers have no voice in the selection of applicants, but, for all the employers know or care, the Union's purpose in selecting some and rejecting others may be encouragement towards union membership, or towards adherence to union policies, matters which, were they the basis for direct employer selection, would constitute clear discriminations within the meaning of Section 8 (a) (3) of the Act.

From the standpoint of the working force generally—those who, for all practical purposes, can obtain jobs only through the grace of the union or its officials—it is difficult to conceive of anything that would encourage their subservience to union activity, whatever its form, more than this kind of hiring hall arrangement. Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experience or virtues are likely to win them jobs at the hands of AGC contracting companies. Instead their concern is, and must be: what, about themselves, will probably please the unions or their agents; how can they conduct themselves best to conform with such rules and policies as unions are likely to enforce; in short, how to ingratiate themselves with the union, regardless of what the employer's desires or needs might be.

Although Section 8 (a) (3), in words, outlaws discrimination which encourages union "membership," more is intended than a literal membership requirement.[4] The contract or hiring arrangement need not explicitly limit employment to union members to be unlawful. The statutory phrase "encourage membership in a labor organization" is not to be minutely restricted to enrollment on the union books; rather, it necessarily embraces also encouragement towards compliance with obligations or supposed obligations of union membership, and participation in union activities generally. It follows that specific or direct proof of such unlawful encouragement is not an indispensable element in every case. If the employer's conduct—whether caused by a union or not—is of a kind that "inherently encourages or discourages union membership,"[5] it is for this Board to draw the inference of illegality from such conduct alone. This follows the common law rule that a man is held to intend the foreseeable consequences of his action.

That encouragement to union membership may be inferred in situations where employers discriminate against employees at the request of a union is now authoritatively established. In the Radio Officers' case, two men were denied jobs solely because of a

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[4]A. Cestone Company, 118 NLRB No. 78; Acme Mattress Co., 91 NLRB 1010, enf'd. 192 F. 2d 242 (C.A.7).

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[5]Radio Officers' Union vs. N.L.R.B., 347 U.S. 17, 45.

union's action. They were union members and, despite absence of direct affirmative evidence that the discrimination encouraged membership in a union, the Supreme Court held that "it was eminently reasonable for the Board to infer encouragement of union membership * * *" It is with this basic principle in mind, that we judge this case and all exclusive hiring halls of this unrestricted and arbitrary type.[6]

Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the union's power and control over the employment status. Here all that appears is unilateral union determination and subservient employer action with no above-board explanation as to the reason for it, and it is reasonable to infer that the union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the respondent union by the three AGC

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[6]See also The Lummus Company, 101 NLRB 1628, where the Board said, "* * * the Respondent's requirement that job applicants obtain approval from the Carpenters as a condition of employment is itself a discriminatory hiring condition within the meaning of Section 8 (a) (3) of the Act."

chapters, the inference of encouragement of union membership is inescapable.[7]

However, we do not read the statute as necessarily requiring elimination of all hiring halls and their attendant benefits to employees and employers alike.[8] The vice in the contract here considered and its hiring hall lies in the fact of unfettered union control over all hiring, and our decision is not to be taken as outlawing all hiring halls. We agree with Senator

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[7]It is not necessary, as the Respondents apparently contend, that any discrimination provided for in the contract must be shown in fact to have occurred before the agreement itself be declared unlawful. The very existence of the contract and its proscribed pro-union provisions exert a prohibited coercive effect upon the employees or, as here, applicants for employment. The Board, with Court approval, has consistently held that maintenance of an unlawful contract, apart from its enforcement, violates the Act. Red Star Express Lines vs. N.L.R.B., 196 F. 2d 78, at 81 (C.A. 2); N.L.R.B. vs. Gaynor News Co., 197 F. 2d 710 (C.A. 2), affirmed 347 U.S. 17.

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[8]See Senate Report No. 1827, 81st Congress, Second Session, Committee on Labor and Public Welfare. It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants. In some industries such basic hiring with the assistance of the union has served to excuse conduct which runs counter to the express proscriptions of the statute which we must enforce.

Taft, the principal proponent of the 1947 Taft-Hartley amendments, who stated that Section 8 (b) (2) was not intended to put an end to all hiring halls, but only those which amount to virtually closed shops.[9]

The basis for a union's referral of one individual and refusal to refer another may be any selective standard or criterion which an employer could lawfully utilize in selecting from among job seekers.

We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be non-discriminatory on its face, only if the agreement explicitly provided that:

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[9]Senate Report No. 1827, supra. Mr. Taft said:

The majority report proceeds upon the erroneous assumption that unless the closed shop prohibition of the Taft Hartley Act is removed for maritime unions, such unions cannot continue to have hiring halls in that industry but must go back to a complete open shop, or even recruitment by "crimps" and "shape-up." The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The board and the Court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.

(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

If, in the operation of a hiring hall that comports with these requirements and is therefore lawful on its face discriminatory acts occur, they are, of course violations of the statute, both by the union which refers or refuses to refer on a discriminatory basis, and by the employer who has delegated the hiring authority to the union. The employer is in pari delicto, and is as responsible as the union for any deviation from the non-discriminatory hiring hall procedure. Any employee or would-be employee who believes himself a victim of discriminatory practices by a union party to an otherwise lawful hiring hall will, of course, have the right to file a charge against both the union and the employer or employers party to the contract in question.

We recognize that a procedure requiring application for employment through a union tends to encourage union membership—in fact it gives to unions a ready forum for organizational activities. However, appraisal of the statute as a whole and the large body of decisional law based upon it, shows that there are many literal forms of encouragement to union membership that are not prohibited. The better representation a union affords, the more successful it is in wresting economic advantage from the employer for the employees, the more it will attract members to it; i.e., "encourage union membership." Clearly such encouragement alone does not always violate Section 8 (a) (3); a line must be drawn between lawful and unlawful encouragement. In some instances, Congress itself draw that line. For example, a discharge for lack of membership in a union is, standing alone, a violation of the Act, and the union causing the discharge violates Section 8 (b) (2). But this same encouragement is not violate of the Act when pursuant to a contract with proper provisions. The board has also drawn a line not expressly required by statute. Discharge of a striker is normally unlawful discouragement of union activity. But when the contracting parties have agreed to a no-strike clause, the striker may lawfully be discharged despite the inevitable discouragement from union adherence.[10] We would draw a similar line between the type of unfettered arbitrary hiring hall present here and one including

[10]Shell Oil Company, Inc., 77 NLRB 1306.

the safeguards set forth above. The first case, revealing an unexplained and autocratic union fiat, fully warrants an inference of unlawful encouragement despite the absence of literal membership requirement; the latter situation, with its assurances to would-be employees of selection based on objective criteria and specifically rejecting union membership or adherence as a basis for selection, effectively rebuts any inference of unlawful union encouragement, and therefore does not support an inference of illegality.

For the reasons expressed above we find, contrary to the Trial Examiner, that the hiring provisions of the contract between the Respondent Employers and the Respondent Unions, which contain none of the safeguards that could serve to rebut the inference that they encourage membership in the Respondent Unions, are unlawful. Accordingly, we conclude that the Respondent Employers have violated Section 8 (a) (3) and (1) of the Act, and the Respondent Unions have violated Section 8 (b) (2) and (1) (A) of the Act, by executing and maintaining in effect the hiring provisions of their contract.[11]

3. We also find, contrary to the Trial Examiner, that the implementation of the unlawful contract

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[11]As only the charge against Respondent Local 242 was filed within six months of the execution of the contract in question, our finding against the other Respondents is limited to the maintenance of the hiring provisions of the contract rather than their execution. Our remedial action herein is in no way affected by this difference.

in the rejection of Lewis' continuous applications for employment was an unfair labor practice by both the Union and Employer Respondents. He was a clear victim of the unlawful hiring system being carried on.

As the Intermediate Report sets forth, Lewis was dropped from membership in the Respondent Local 242 for non-payment of dues about 1950. Starting about March 15, 1956, he came to the hiring hall and asked for work, but was told none was available. During the next 7 or 8 weeks he returned to the hiring hall several times each week seeking work, but was repeatedly told there was no work, despite the fact that other hod carriers were being dispatched to jobs on many occasions during the same period. He attempted to persuade the Union to reinstate him during this period, with the hope that he might avail himself of the hiring hall, but was told by Allman, Local 242's corresponding secretary and dispatcher, and Buchanan, its financial secretary and business representative, that the Union "wouldn't take any new members." On one occasion, on May 9, 1956, Lewis obtained a job directly from a contractor, not a member of any AGC Chapter. Business representative Buchanan came to the project and told the contractor that he would place a picket line at the project unless he hired only union members.

Five days later, on May 14, when Lewis appeared once again at the office of the Union and asked Allman to dispatch him, Allman told Lewis that the Union was not going to give him "a damned thing,"

and that he should "get out and stay out." On May 17, Lewis was the first hod carrier at the hiring hall, but was not sent on a job although a number of hod carriers reported to the hiring hall and were dispatched during the day. Thereafter, Lewis was actually dispatched to jobs on a number of occasions, with a clear indication from the Union's representatives that they hoped this would induce him to withdraw the charges he had filed against the Union.

As an old-time member of the Union, and aware of the established hiring hall arrangement, Lewis, of course, went to the Union to apply for work. Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance, for that is precisely what the contract obligated each employer to do. It matters not, therefore, which of the two parties to the illegal contract he first approached. His unlawful exclusion from employment was a joint act by both Respondents.[12] It is equally immaterial that there is no evidence now before us that on the particular days when he was rejected there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract. The Board and the Courts have held that

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[12]As indicated above, even were the particular hiring agreement here involved a lawful one, the Respondent Employers, having delegated hiring authority to the Union, would be in pari delicto and equally responsible with the Union for any particularized discrimination, as happened to Lewis here, that the Union perpetrated.

neither unavailability of work or lack of application for a particular job serves as a defense to a discriminatory hiring policy when it is clear that no job would be proferred in any event.[13] At best, questions respecting what work was in fact available and unlawfully denied Lewis, are matters for investigagation in the compliance stage of this proceeding in determining the amount of back pay due him pursuant to our remedial order.

We find, accordingly, that the Respondent Unions violated Sections 8 (b) (2) and (1) (A) of the Act, and the Respondent Employers violated Sections 8 (a) (3) and (1) of the Act, with respect to Lewis.

Dated, Washington, D. C.

[Seal] NATIONAL LABOR
RELATIONS BOARD,
.....,
BOYD LEEDOM,
Chairman;
.....,
PHILIP RAY RODGERS,
.....,
STEPHEN S. BEAN,
.....,
JOSEPH ALTON JENKINS,
Members.

Issued March 27, 1958.

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[13]Daniel Hamm Drayage Company, Inc., 84 NLRB 458; enfd. 185 F. 2d 1020 (C.A.5); Seabright Construction Company, 108 NLRB 8; J. R. Cantrall, et al., 96 NLRB 786, enfd. 201 F 2d 853 (C.A.9), cert. denied, 345 U.S. 996; N.L.R.B. vs. Swinerton and Walberg, 202 F. 2d 511 (C.A. 9).

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1374

In the Matter of:

MOUNTAIN PACIFIC CHAPTER; SEATTLE CHAPTER; and TACOMA CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

and

CYRUS LEWIS.

Case No. 19-CB-424

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION, LOCAL No. 242, AFL-CIO,

and

CYRUS LEWIS.

Case No. 19-CB-445

WESTERN WASHINGTON DISTRICT COUNCIL, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS OF AMERICA,

and

CYRUS LEWIS.

TRANSCRIPT OF PROCEEDINGS

Thursday, October 25, 1956

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Herman Marx, Esq.,
Trial Examiner.

Appearances:

MELTON BOYD, ESQ.,
Appearing on Behalf of General Counsel.

LYLE L. IVERSON, ESQ., of
LYCETTE, DIAMOND AND SYLVESTER,
Appearing on Behalf of the Seattle and Tacoma Chapters of the Associated Contractors of America.

ARVIN P. CARNEY, ESQ., of
ELLIOTT, LEE & CARNEY,
Appearing on Behalf of Mountain Pacific Chapter of the Associated General Contractors of America.

ROY E. JACKSON,
Appearing on Behalf of the Building and Common Laborers Union of America, Local No. 242, AFL-CIO. [2*]

* * *

The Court: Let me ask you, gentlemen, I note that each individual respondent, that is, at least each A.G.C. respondent, admits certain commercial facts applicable to itself or to its members. An admission by one party, under a ruling by the Ninth Circuit Court of Appeals in the matter [7] of the Haddock case, is not an admission by any other

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

parties. I don't know why that case had to reach the Circuit Court to have that question decided.

Is there any possibility, in order that we may save some time, and solely for that purpose, is there any possibility that you can reach some stipulation about commerce, which is to be a stipulation embodying facts which are to be taken as commerce facts in this proceeding?

Mr. Iverson: We have admitted in our answers, on behalf of the Seattle and Tacoma chapters, that they have some members who have more than a hundred thousand dollars worth of business a year and some that don't. I don't know as there is anything more to prove on that. I think that is a fact we have admitted in the answer and I don't know whether there is any other issue on it. [8]

* * *

Trial Examiner: I suggest a far more, it seems to me a far more, specific way of disposing of this simply would be that the union, if it so desires, admit so much of the complaint with respect to Paragraphs I and II as the three chapters admit in their respective answers.

Mr. Jackson: I assume we will go along with that, yes. I think the union can go along with that.

Trial Examiner: That puts you in no better nor in any worse position than they.

Now, the union, then, stands on an even footing as far as admissions are concerned concerning paragraphs I and II, as the chapters, and I think we have saved some time, gentlemen.

* * *

COLTON HARPER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [11]

Direct Examination

* * *

By Mr. Boyd:

Q. With that basis, or that information as a basis, for your answers, are your employers of the A.G.C., Seattle Chapter, performing construction work for firms in excess of a hundred thousand dollars annually, which firms themselves are producing goods that are shipped in interstate commerce, valued in excess of a hundred thousand dollars? A. Yes. [12]

Q. I think you have prepared a gross figure.

A. Yes, I have.

Q. With respect to the total amount of such construction? A. Yes, I have.

Q. What is that gross figure?

A. I would like to add that these totals are records of awards, they are not complete, and we don't have, and we don't have them on negotiated jobs as such, but these are on competitive bidding jobs.

For firms who annually ship goods in excess of $100,000 in interstate commerce, for the year of 1955, our members, $26,586,361.

Q. Thank you, sir. Do you have a breakdown of the dollar volume of work that was done under contract directly with the United States Govern-

(Testimony of Colton Harper.)

ment which related to defense installations performed by your members?

A. That was $23,431,353.

Q. Do you have a further breakdown of the dollar volume of work done by your members in construction work outside the state of Washington?

A. $20,773,717. **[13]**

* * *

Q. (By Mr. Boyd): Mr. Harper, does your association normally or regularly or with any regularity negotiate collective bargaining agreements with labor organizations in this area?

A. Yes. [14]

* * *

CYRUS LEWIS

a [203] witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [204]

Direct Examination

* * *

Q. Hod Carriers' Union?

A. Well, they carrier Hod Carriers, the Hod Carriers' Union?

Q. Did you belong to one here in Seattle?

A. Yes.

Q. Which one? A. Two-four-two.

Q. When did you join?

A. I joined in 1949.

Q. Are you presently a member? A. No.

(Testimony of Cyrus Lewis.)

Q. When did you drop out?

A. I dropped out about '50.

Q. In 1950? A. Yes.

Q. Since 1950 have you made any efforts to rejoin? A. Yes.

Q. Let's come to 1956. Did you in 1956 seek work as a common laborer?

A. I seeked work as hod carrier.

Q. When did you begin looking for work as a hod carrier in 1956?

A. About the 15th of March.

Q. About the 15th of March? [205]

A. Yes.

Q. Where did you go when you first looked for work? A. I went to the union hall.

Q. Do you recall with whom you talked down there when you went down there?

A. Yes, I talked with Buchanan and Leo.

Q. What did they tell you?

A. They kept telling me every time I would go there that there wasn't anything.

Q. How frequently did you go in the month of March?

A. I went from two to three times a week [206]

* * *

Q. (By Mr. Boyd): I hand you here, Mr. Lewis, to refresh your recollection, these paycheck stubs—here, you use my glasses, I have to use them to read it. I direct your attention here to the date of April 2, 1956. Was that the last of the checks

(Testimony of Cyrus Lewis.)

you got from the Metropolitan Builders, was that the last of the work you got with them?

A. Yes.

Q. How long did you work for them?

A. I worked for them nine days.

Q. After you got this money for working for Metropolitan Builders, what did you do?

A. I finished, the last day they paid me off I went down to the union hall.

Q. On that same day?

A. No, the following day.

Q. That would be on April third, then?

A. That is right. And I went down and offered to reinstate or pay some dues or whatever they would let me do to show that I didn't want to be a slacker. I wanted to be a union member, and they wouldn't accept my money at all from me.

Q. Who did you talk with at that time? [209]

A. I talked to Leo and Buchanan both.

Q. What did Buchanan say to you and what did Leo say to you, on this particular occasion right after you worked on this Metropolitan Builders job?

A. Well, I talked to Buchanan and Buchanan said, "Talk to Leo about it," and Leo said that he wouldn't receive any money, wouldn't take any money from me, that there weren't any jobs and he wouldn't take any new members.

* * *

(Testimony of Cyrus Lewis.)

Q. Fixing in your mind that May 11th fell on Friday, can you tell us what happened on May 9th?

A. Well, May 9th I went to the union hall in the morning and I walked up to the window and I asked for work. They told me there wasn't anything. I stayed at the union hall until about 10:30 and then I left. While walking on my way home I ran into this job that Mr. Nielsen had, moving the Teamsters' Building, [210] and Mr. Nielsen put me to work. Iworked five hours up there. About 4:30 that evening Buchanan came on the job and had me pulled off.

Q. Well now, will you tell us what Buchanan said to you, what you said to Buchanan and what you heard Buchanan say to others? And can you fix the time specifically?

A. Buchanan came on the job and walked up to me and asked me what I was doing there.

Trial Examiner: What time was that?

The Witness: I would say that would be about 4:15.

Trial Examiner: All right, now what if anything did you say or what did he say? Tell us.

The Witness: Well, he asked me what was I doing working there and I told him, I said, "I am working here because Mr. Nielsen gave me a job." And he said, "Who is Mr. Nielsen?" And about that time Mr. Nielsen walked up and I pointed out Mr. Nielsen to him. Then he asked Mr. Nielsen why he had nonunion men working there, and so in the meantime he told Mr. Nielsen if he kept hiring non-

(Testimony of Cyrus Lewis.)

union men he was going to put a picket around the job, and at that time he walked away from me. That is all I heard. [211]

* * *

Q. The record in evidence shows that that charge was received by the union on Monday, May 14th. Were you at the union hall on Monday, May 14th?

A. Yes.

Q. What time did you go there?

A. I went to the union hall about 7 o'clock that morning.

Q. Will you tell us what took place on Monday, May 14th?

A. I went down to the union hall on Monday, May 14th, and I walked up to the window and asked for some work.

Q. Who did you talk with?

A. I spoke to Leo. [212]

Q. All right, then what happened?

A. Leo says to me, "We have heard you filed a charge against the union and we are not going to give you a damned thing."

Q. Was there anything further said?

A. And he said, "We are not going to give you a damned thing so get out and stay out." [213]

* * *

Q. Tell us what took place on the 17th, all the way through.

A. On the 17th I went down to the hall that morning.

Q. What time did you get there?

(Testimony of Cyrus Lewis.)

A. I got there that morning about a quarter to 7.

Q. Were there other people there when you got there? [218] A. No, I was the first man in.

Q. All right, now, go ahead.

A. I was the first man in the hall. About 7 o'clock there was about four or five other hodcarriers came in. There was quite a few jobs that morning and they sent all the guys out but me.

Trial Examiner: Who sent them out?

The Witness: The dispatcher, Leo. Leo sent all the guys out but me.

Q. (By Mr. Boyd): Had you gone up to the window when he came there?

A. Yes, I went up to the window when he first came in.

Q. All right, go ahead.

A. So he said there wasn't anything right then, but he sent out five guys and left me sitting there. About 10:30, about 10 o'clock that morning there was several calls came in and he came out looking for a hodcarrier, and I am still sittin' there, and this hodcarrier, this job was for some brick job at Todd's, and I saw him. How I could tell that he wanted a hodcarrier, I walks up to him and I said, "I will take that job," and he told me that the job was out somewhere at some other place, I don't know what it was, but he told me something, that it was someplace else. He told me it wasn't a hodcarrier's job. Sometime later there was a hodcarrier came in by the name of Mr. Johnson. He gave Mr.

(Testimony of Cyrus Lewis.)

Johnson this job that [219] I asked for that I knew he had.

* * *

Q. (By Mr. Boyd): This becomes hearsay, Cyrus, so instead of going over this conversation with Johnson let's go back to after the job was given to Johnson that morning, on the morning of May 17. After you had been sitting around there and the job was given to Johnson, what did you do?

A. I stayed there until about 10, 10:15 or 10:30. There was a job came in, or Leo gave me this job——

Q. (Interrupting): Before he gave you the job, I want to find out, did anything happen between the time that Johnson was sent out on a job and you were given a job?

A. The only thing I can remember at the time, Johnson went out just before I did, and the only thing I can remember before he gave me this job he replied to me, he said, "I am going to give you a job; I am going to give you this job; and I want you to go up to the courthouse on your way up; I want you to go up to the courthouse this morning and withdraw the suit against the union."

Trial Examiner: Leo said this?

The Witness: Yes.

Trial Examiner: All right, go ahead. [220]

A. And I told him I would, I would go and see what I could do about it.

Q. (By Mr. Boyd): He gave you a dispatch then to a job? A. Yes

(Testimony of Cyrus Lewis.)

Q. Where was that job?

A. This job was out in the Sandpoint district.

Q. Do you remember the name of the employer?

A. The name of the employer was Landrus, I believe.

Q. Before you went out on the job did you make any report of what you were doing?

A. Before I went to the job, on my way downtown, on my way to the job downtown, I stopped in a telephone booth and I called Mr. Dan Boyd.

Q. And told him you were going out on a job?

A. I told him I was going out on a job.

Q. Had you talked with him earlier that day?

A. Yes.

Q. Where? A. On the telephone——

Q. (Interrupting): From where?

A. From the union hall.

Q. That is the thing I want you to tell us about. When was [221] this earlier telephone call?

A. The telephone call was earlier that morning when I was the first man there. They sent out all the men and left me sitting there, and I made a report to Mr. Dan Boyd about how they was treating me about giving me work.

* * *

Mr. Boyd: I would make an offer, that this witness, if permitted to testify, would testify that the field examiner told him he would call the union hall. And I would point out to the Trial Examiner that

(Testimony of Cyrus Lewis.)

yesterday Mr. Buchanan testified that he got a call on that morning.

Trial Examiner: Mr. Boyd?

Mr. Boyd: From Mr. Dan Boyd. [222]

* * *

Q. Tell us what took place on the 23rd.

A. On the 23rd I went to the Union Hall that morning about 7:30. I walks up to the window and asks Leo for a job. He said to me, he said, "Did you go down and withdraw the charges against the union?" I told him no. He turned to Buchanan and said, "Lewis didn't do what we told him to do," he says, and so Buchanan says, "Well, I am not going to be here much longer, the hell with him." And Leo says, "You didn't go down and withdraw the charge like I told you to so you can get out and stay out as far as I am concerned." [224]

* * *

Q. Did you get any work from them through the union during the remaining days in the month of May? A. No.

Q. Did you go back to the Union Hall? [226]

A. I certainly did.

Q. How frequently?

A. I went two, three times, sometimes four times, a week at that time. [227]

* * *

Q. I will hand you here pay slips which indicate that you worked for Lloyd E. Beck for a

period beginning September 19 through September 28, 1956. Is that about the time that you were working there, according to your own [242] recollection? A. Yes.

Q. You say you talked with Leo when you were working on that job? A. Yes.

Q. Will you tell us now in detail what happened in that conversation?

A. Well, he came on the job and called me off in person again and asked me had I tried to withdraw this case, and I told him, I said, "Well, I have called them up and talked to them," which I hadn't, and he says—at the time I wanted to keep working. I didn't know whether he was going to pull me off the job or what. I stalled him off. And at the time he says, "Well, to prove to me that you have tried to withdraw the case or want to withdraw the case," he says, "will you sign a paper stating that you want to withdraw the case or will withdraw the case?" and I told him, I says, "I will tell you, when I talked to them they told me it was out of my hands," and "I would rather you would call up and talk to some officials up there, my lawyer or somebody, some official up there. There is nothing else I can do." So the conversation led on from one word to the other, but I guess then part of it was he was trying to get me to sign a statement that I would

Mr. Jackson: Well——

withdraw the case at that time.

Mr. Boyd (Interrupting): He is only reiterating what he [243] said.

Trial Examiner: I am going to strike this wit-

ness' supposition as to what Leo was trying to get him to do.

Q. (By Mr. Boyd): Did Leo make any statement to you with reference to other cases at that time?

Mr. Jackson: Just a minute. Other cases, what do you have reference to?

Mr. Boyd: The only way I can get it is from the witness. It is germane to the context in which this was being said.

Trial Examiner: We will find out. If there is an objection or a motion to strike, why, I will pass on it.

Go ahead, sir.

Q. (By Mr. Boyd): What was it he said?

A. He says to me, he says, "Whether you know it or not," he says, "there has been other cases filed against the union," he says, "there has been other cases filed against the union," and he says, "we have given the boys work and they have withdrawn the cases," and he said, "I came up to talk to you to see if you would withdraw the case, if you want to keep on working." [244]

* * *

Trial Examiner: But for the purposes of discussion here, [338] assuming that the three chapters are employers, wouldn't you have to show that their members or any of their members, or that some members of each of the chapters had, in fact, discriminated against Mr. Lewis?

Mr. Boyd: That would be one way. The other way is to show that their agent, to wit, the Com-

mon Laborers Local, which is their hiring agent, has discriminated. They contractually agree that the union will be their hiring agent.

* * *

Trial Examiner: Will you agree you haven't proved it in this proceeding?

Mr. Boyd: I agree that we have taken up no specific employer's case wherein we have shown that the union kept Lewis [339] from taking an available job, because we don't know of those things.

* * *

Trial Examiner: You haven't proved, have you, that a [340] single chapter member at any time in question here requested a dispatch of any hodcarriers to any job, have you?

Mr. Boyd: I believe that is in this record here, that the A.G.C. Chapter members were giving effect to this contract.

Trial Examiner: Well, I know, but the point is this, this is all in generalized testimony.

Mr. Boyd: Yes. [341]

* * *

Mr. Boyd: We can't infer which job it was, I certainly agree with that, because we just don't know which job it was.

* * *

Received November 7, 1956. [341]

* * *

[Endorsed]: No. 15966. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Appellant, vs. Mountain Pacific Chapter of the Associated General Contractors, Inc.; The Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter; International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO., and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO., Respondent. Supplemental Transcript of Record. Petition to Enforce and Petitions to Review Order of the National Labor Relations Board.

Filed June 2, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15966

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC.; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER, INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL No. 242, AFL-CIO,

and

WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO,

Respondents.

ANSWER AND PETITION FOR REVIEW OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

To the Honorable Judges of the Ninth Circuit Court of Appeals:

The Associated General Contractors of America, Tacoma Chapter, hereby answers the petition for enforcement heretofore filed by the National Labor Relations Board, and petitions for a review by this court of the proceedings of the National Labor Relations Board and the order of said board in this matter.

Answering the allegations of the petition for enforcement, this respondent alleges:

1. This respondent, Associated General Contractors of America, Tacoma Chapter, is a Washington corporation, functioning as a business association to advance the common good of its members, and is not otherwise engaged in business. Its activities are carried on within the Ninth Circuit. Except as admitted herein, this respondent denies the allegations of paragraph 1 or denies that it has knowledge or information sufficient upon which to form a belief as to the truth or falsity thereof.

2. Answering paragraph 2, this respondent admits the entry of an order by the National Labor Relations Board under date of December 14, 1957, and admits that the same was served upon it, but denies that said order was legal or valid.

3. This respondent has no knowledge as to the allegations of paragraph 3.

Petition for Review

This respondent petitions this court to review the order of the National Labor Relations Board in the

consolidated cases, before designated cases Nos. 19-CA-1374; 19-CB-424, and 19-CB-445, insofar as said order was directed against this respondent.

1. This petition for review is made pursuant to the provisions of subparagraph (f) of Section 160, Title 29, United States Code.

2. This respondent alleges that the transcript which will be filed by the National Labor Relations Board in connection with its petition for enforcement will be the same transcript as would be involved in this petition for review.

3. The order of the National Labor Relations Board is invalid and erroneous for the following reasons:

This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not, and at no time material hereto was, an employer within the meaning of the National Labor Relations Act, nor was it engaged in commerce.

The procedure was not commenced within the time limited by law, particularly section 10(b) of the National Labor Relations Act.

It was not established that this respondent engaged in any unfair labor practice.

The findings of the National Labor Relations Board do not support the order which was entered against this respondent.

The order of the National Labor Relations Board is contrary to law.

Wherefore, this respondent prays that the order of the National Labor Relations Board be reviewed and set aside as to it, and that the petition for enforcement be denied.

LYCETTE, DIAMOND & SYLVESTER,

Attorneys for Associated General Contractors of America, Tacoma Chapter;

By /s/ LYLE L. IVERSON.

[Endorsed]: Filed July 8, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

Respondents Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter, will rely upon the following points in connection with their petition for review:

1. Neither of these respondents is subject to the jurisdiction of the National Labor Relations Board

and are not and at no time material hereto employers within the meaning of the National Labor Relations Act nor was either of these respondents engaged in commerce.

2. The procedure was not commenced within the time limited by law, particularly Section 10(b) of the National Labor Relations Act.

3. It was not established that either of these respondents was engaged in any unfair labor practice.

4. The findings of the National Labor Relations Board do not support the order which was entered against these respondents.

5. The order of the National Labor Relations Board is contrary to law.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Associated General Contractors of America, Seattle Chapter, Inc., and Associated General Contractors of America, Tacoma Chapter.

By .....

[Endorsed]: Filed July 17, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC.

To: The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

This respondent will rely upon the following points in connection with its petition for review:

1. This respondent is not subject to the jurisdiction of the National Labor Relations Board and is not, and at no time material hereto was, an employer within the meaning of the National Labor Relations Act, nor was it engaged in commerce.

2. The procedure was not commenced within the time limited by law, particularly Section 10(b) of the National Labor Relations Act.

3. It was not established that this respondent engaged in any unfair labor practice. That it was established that neither this respondent nor its members have any business transactions with the Building and Common Laborers Union of America, Local No. 242, AFL-CIO, or its members.

4. The findings of the National Labor Relations Board do not support the Order which was entered against this respondent.

5. The order of the National Labor Relations Board is contrary to law.

ELLIOTT, LEE, CARNEY & THOMAS,

By /s/ ELVIN P. CARNEY,

Attorneys for Respondent-Petitioner, Mountain Pacific Chapter of the Associated General Contractors, Inc.

[Endorsed]: Filed October 9, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL No. 242, AFL-CIO AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO

Respondents International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, will rely upon the following points in connection with their petition for review:

1. That the proceeding instituted by and before the National Labor Relations Board was not commenced within the time limited by law, particularly Section 10(b) of the National Labor Relations Act.

2. It was not established that either of these respondents was engaged in any unfair labor practice.

3. The findings of the National Labor Relations Board do not support the order which was entered against these respondents.

4. The order of the National Labor Relations Board is contrary to law.

/s/ L. PRESLEY GILL,
Attorney for International Hodcarriers, Building and Common Laborers Union of America, Local No. 242, AFL-CIO, and Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO.

[Endorsed]: Filed October 10, 1958.

No. 15966

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, *Respondents.*

ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW OF MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS

BRIEF OF RESPONDENT MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, IN SUPPORT OF ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW

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THE ARGUS PRESS, SEATTLE

No. 15966

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; and WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, *Respondents.*

ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW OF MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS

BRIEF OF RESPONDENT MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, IN SUPPORT OF ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW

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THE ARGUS PRESS, SEATTLE

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Answer to Petition for Enforcement and Petition for Review of Mountain Pacific Chapter of Associated General Contractors

BRIEF OF RESPONDENT MOUNTAIN PACIFIC CHAPTER OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, IN SUPPORT OF ANSWER TO PETITION FOR ENFORCEMENT AND PETITION FOR REVIEW

STATEMENT OF CASE

A. Counter and Additional Statement of Case

Mountain Pacific Chapter of Associated General Contractors of America (hereinafter referred to for the sake of brevity as Mountain Pacific) is an independent

incorporated association of employers (R. 98) whose members are primarily engaged in what is called heavy construction (R. 96) such as dams, bridges and highways. Contrary to petitioner's statement, pages four and five of its brief, neither Mountain Pacific nor its members secure or recruit workmen from either respondent Western Washington District Council of International Hodcarriers, etc. (hereinafter called District Council), or from its local union Number 242 (hereinafter referred to as Local 242) (R. 99, 100). Mountain Pacific does not hire any mechanics or laborers and is not itself engaged in the contracting field (R. 99) but acts solely as representative of its members in negotiating labor agreements. Mountain Pacific did, with the Tacoma Chapter and the Seattle Chapter, both of which are separate corporations, jointly sign with District Council but not with the individual members of the council such as Local 242, the labor agreement which includes the complained of Section 6 hiring provisions (General Counsel's Exhibit No. 4, R. 178). Members of Mountain Pacific do recruit labor through local unions represented by District Council that are not named in this action.

Cyrus Lewis, a hodcarrier, sought membership in and employment through respondent Local No. 242 (R. 141, 142). His work as a hodcarrier is foreign to the class of work in which Mountain Pacific members are engaged. There is no evidence that Cyrus Lewis ever applied for work of any kind with Mountain Pacific [redacted] or any of its members or any union with whom Mountain Pacific members customarily deal in recruiting labor. There is no evidence that any work refused Cyrus Lewis

involved Interstate Commerce. There is no evidence that the hiring hall clause, Section 6 of the labor-agreement, resulted in or caused Local No. 242 to discriminate against Cyrus Lewis.

The trial examiner specifically found and concluded that there was no evidence to support the charge against Mountain Pacific and the other A.G.C. chapters of an unfair labor practice as to Cyrus Lewis (R. 33-35).

B. Questions Involved

The answer and petition for review of Mountain Pacific raises the following questions.

1. Were the provisions of Section 6 of the collective bargaining agreement (R. 178) providing for recruitment of employees through union administered hiring halls *per se* illegal? Respondent Mountain Pacific contends that the answer should be no.

2. Was Mountain Pacific an employer under act or engaged in Interstate Commerce insofar as Lewis was concerned? Mountain Pacific urges it was not.

3. Assuming the provisions of the contract for labor recruitment to be illegal *per se* and further assuming that the operation of the hiring hall of Local 242 was discriminatory as to Cyrus Lewis, was Mountain Pacific merely because a party to the collective bargaining agreement with Washington District Council liable to make Cyrus Lewis whole for lost wages if any, where Mountain Pacific had no part in the discriminatory acts complained of, never dealt with Local 242 and there is no evidence that Cyrus Lewis ever sought employment from Mountain Pacific or any of its members? Moun-

tain Pacific contends that it is not responsible for acts of Local 242.

4. In the absence of proof that discrimination by Local 242 against Cyrus Lewis in job referral, resulted from a hiring clause, can N.L.R.B. and the courts presume such to be the case? Mountain Pacific urges there is no basis for such presumptions.

SPECIFICATION OF ERRORS

1. The National Labor Relations Board has erred in finding or concluding contrary to trial examiner's concluding findings (R. 23-35) that Mountain Pacific violated Section 8(a)(3) and (1) of the act (Decision and order of N.L.R.B. paragraph (2) appearing at R. 45).

2. The N.L.R.B. further erred in finding No. 3 that "the implementation of the unlawful contract in the rejection of Lewis' continuous application for employment was an unfair labor practice, and that the respondent union thereby violated Section 8(b)(2) and (1)(A) of the act and the respondent employers thereby violated Section 8(a)(3)(1) of the act" (R. 46).

3. The N.L.R.B. further erred in not following the findings of the trial examiner as set forth in his concluding findings in intermediate report (R. 6) particularly the following:

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30)
>
> "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC Chapters (or,

for that matter, any other employer) discriminated 'with respect to the hire of Lewis, as the complaint alleges, and that Local 242 caused such discrimination, within the meaning of the Act. The heart of the matter is that there is no evidence in the record that any member of any of the AGC Chapters sought or requisitioned any labor at or through the office of Local 242 at any time since the effective date of the contract. Moral convictions that such requisitions were made will not suffice, for they are no substitute for evidence." (R. 33, 34)

"There is no doubt, as pointed out earlier, that Local 242 discriminated against Lewis, but there can be no finding that it discriminatorily exercised the authority delegated to it by members of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242, the agency through which Lewis sought job referrals. The critical fact is that there is no such evidence, and however one may condemn the treatment accorded Lewis by Local 242, and desire to do him moral justice, one must not blind himself to deficiencies in the evidence." (R. 35)

ARGUMENT

Respondent Mountain Pacific's answer and petition for review raised questions of both law and fact. Its position may be summarized as follows:

1. Mountain Pacific is not subject to the jurisdiction of the National Labor Relations Board in that as to this case it was not an employer within the meaning of the Labor Management Relations Act of 1947 nor was it engaged in commerce. The mere fact that Mountain Pacific may be subject to jurisdiction for some purposes does

not by virtue thereof subject it to jurisdiction in all cases of unfair labor practices.

2. It is not established that Mountain Pacific engaged in any unfair labor practice. It was established that neither Mountain Pacific nor its members had any business transaction with Local 242.

3. The board's conclusion and findings as to Mountain Pacific are not supported by the evidence and are based on surmise and conjecture.

The argument in support of Mountain Pacific's position cannot readily be separately stated and accordingly arguments for each point are commingled but will be segregated to the maximum extent possible.

I.

Lack of Jurisdiction

Mountain Pacific is a legal entity. Some of its contractor members do engage in Interstate Commerce and do employ persons within the protection of the National Labor Relations Act. From this fact the N.L.R.B. concludes that it has jurisdiction as to Mountain Pacific in this case, even though there is no evidence of Interstate Commerce activities of either Mountain Pacific or its members as to work if any available to Lewis, a Hod Carrier. Merely because one is engaged in Interstate Commerce for some purposes, does not make the person subject to jurisdiction of the National Labor Relations Act for all purposes.

The word employer as used in the Labor Management Relation Act of 1947 is defined in Section 2 as follows:

"The term 'employer' includes any person acting

as an agent of employer directly or indirectly * * *."

From the definition of the Act it does appear that an employer is either the actual employer of labor in Interstate Commerce or one who acts as an agent for the employer. The mere fact that a person may be an employer as that term is generally understood and defined does not of itself make a person an employer insofar as the Labor Management Relations Act of 1947 is concerned. The basic question in this case is whether Local 242 under common law principles or definitions of the Act in assigning men to work acted as agents of Mountain Pacific so as to impose liability on Mountain Pacific for illegal hiring practices of the union, if any. Mountain Pacific is an employer of its own office employees. It was under definition of the act an employer in negotiating the collective bargaining agreement under consideration in this case, because in signing the agreement it acted as agent for its members who were in turn employers under the Act. Its agency under the evidence ceased with the signing of the agreement unless further acts of agency be proved. General Counsel and the Board assert Mountain Pacific is liable because of alleged implementation of the agreement. There is no proof whatsoever that Mountain Pacific implemented, encouraged or acted for any employer insofar as Lewis and Local 242 is concerned. Mountain Pacific becomes an employer only if it is in itself employing labor out of Local 242 or acts for its members in so doing. Mountain Pacific may for certain purposes under the act be an employer, because acting as an agent for employers, namely contractors engaged in the construction indus-

try. Construction contractors, members of Mountain Pacific are never agents of Mountain Pacific, either under definitions of Act or the evidence. There is no evidence that Mountain Pacific ever seeks to obtain employees for its Contractor members. Likewise, the mere fact that Mountain Pacific members engage in Interstate Commerce does not, even if Mountain Pacific is an employer, make it liable for all unfair labor practices occurring in the State of Washington. Assume for example, that a Contractor engaged in Interstate Commerce as an employer has a residence in the state and calls on Local 242 for two purposes. One for some laborers to do digging about his residence and the other for the purpose of handling materials that have moved in Interstate Commerce. Assume in both cases that the employment of the individuals involved was discriminatory under the descriptions of Section 8(a)(1) and (3) of the Act. It would appear obvious under these facts that assumed employer could be charged with discrimination as to one employee but not the other. There is no evidence that any member of Mountain Pacific or Mountain Pacific had any work for Lewis or any hod carrier (R. 141, 142), in fact the record is that the members of Mountain Pacific do not use Local 242 as a source of labor (R. 99, 100). There is no evidence that hod carriers are used by Mountain Pacific members on highway and heavy construction.

II.

Implementation and Illegality of Contract

In paragraphs two and three of the N.L.R.B. Decision and Order (R. 45, 46) the Board reversed the trial examiner and in effect found although no formal find-

ing was made that by executing and maintaining in effect the hiring provisions of the agreement, that is by implementation of the unlawful contract, both Local 242 and Mountain Pacific violated Section 8(a)(3) and (1) of the Act. There is no evidence that Mountain Pacific did anything to implement or enforce the agreement after its execution. Implementation as found by the Board, therefore, seems to rest solely on the fact that the Collective Bargaining Agreement after it was once executed was not terminated by mutual agreement of the signatories thereto, and accordingly the N.L.R.B. order rests entirely on the illegality of Section 6 of the Contract. The legality of Section 6 will be covered by briefs of other respondents in this action and as such are incorporated by Mountain Pacific as if herein fully set forth. Mountain Pacific does agree with the trial examiner's comments on hiring halls particularly his comment (R. 28, 29) as follows:

> " * * * Upon close scrutiny of the General Counsel's position, what it implies is that one should indulge a presumption from the naked provisions of Section 6, alone, that the parties thereto intend to, and will, use them for unlawful purposes, despite the fact that they may also be used for the lawful purpose of furnishing employers with an advantageous source for the supply of labor, and jobseekers with a convenient method of securing work. The adoption of such a doctrine would, in my judgment, run counter to traditional and elementary legal concepts. * * * "

We further agree with Abe Murdock, Board member's dissenting opinion (R. 55-63 inclusive), particularly the following statement made by him.

"* * * This is as much as to say that an employer violates Section 8(a)(3) of the Act merely by discharging a union member unless at the same time he states that the discharge is for economic reasons. My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership. Absent such proof, no unfair labor practice has been committed whether or not economic reasons were assigned by the employer for the discharge at the time it occurred. My view of the law in this respect is so well settled that it needs no citation of authority. In my opinion, the majority's novel approach to the hiring hall issue amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation. To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred." (R. 60, 61)

III.

Answer to Appellant's Argument

Conclusions of law and orders of court are based on facts fairly found from competent evidence. These fundamental rules of law are not changed by the Labor Management Relations Act. Under the foregoing principles, the rule should be, and we believe it is, that the findings of the trial examiner are not to be upset by the Board, or this court, unless clearly contrary to the evidence introduced. *N.L.R.B. v. Swinerton,* 202 F.(2d)

511. Particularly would the foregoing be true where the evidence is not controverted, or where a finding is refused or not made because no competent evidence to support the same can be found in the record. Findings should not be based on assumptions and surmises, but on the record. We are not in a field where legal presumptions or judicial notice take the place of evidence. General Counsel, in the N.L.R.B. brief, seeks to avoid the deficiencies in the record by a circuitous argument which amounts, in its final analysis, to a statement that since the Collective Bargain Agreement was illegal *per se,* there was discrimination, and since there was discrimination, the Collective Bargaining Agreement was illegal *per se,* or by substituting what is claimed to be common knowledge, for evidence that does not appear in the record.

The trial examiner, in his concluding findings, correctly states (R. 24) that to find the contract illegal *per se,* it is necessary to approach the problem solely from the relevant language of the Agreement, without regard to contentions advanced by the General Counsel that the A.G.C. Chapters actually discriminated in the hiring of Lewis. The trial examiner then concludes that the Agreement is not illegal *per se* and capably distinguishes cases relied on by General Counsel, namely, *Pacific Intermountain Express Companies,* 107 NLRB 838, as modified, 225 F.(2d) 343. Careful analysis by trial examiner appears in the record (R. 24-30). Particularly relevant is his comment (R. 30) as follows:

> " * * * But it seems to me that hiring hall provivisions which are not stated in discriminatory terms, do not become discriminatory simply be-

> cause of the omission of an express prohibition against discrimination. * * * ''

The trial examiner then proceeds to examine the evidence of actual discrimination in the hiring of Lewis and makes a finding that there was no such discrimination by the A.G.C. Chapters. This finding is set out in paragraph (3) of the Specifications of Error at page 4 of this brief.

Notwithstanding this lack of evidence, the N.L.R.B., in its order and decision (R. 44 at 45 and 46), concludes without making any specific finding that discrimination in fact occurred. General Counsel, in his brief, attempted to support this position.

A substantial error occurs in the Statement of Facts at page 5 of the N.L.R.B. brief. The erroneous statement is that:

> ''The employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242 hiring hall.''

The record does not support this conclusion, and in fact contradicts the findings of the trial examiner, above mentioned, and is contrary to the uncontradicted testimony of Will Landaas (R. 99, 100) that the Mountain Pacific Chapter does not use Local 242, particularly hod carriers. In fact, there was no proof, as trial examiner found, that any A.G.C. Chapter, or any of its members, requisitioned any labor from Local 242 during the period in controversy (R. 33).

At page 17 of the N.L.R.B. brief, General Counsel states:

> '' * * * The prerequisites to a finding that these Sections have been violated, thus, are a showing

> (1) of discrimination respecting employment for which the employer and union are responsible; and (2) that such discrimination encourages or discourages union membership. * * * ''

General Counsel then quotes cases of actual employer discrimination with facts sufficient in themselves to charge the employer with unfair labor practices. These cases all involve contracts where union employees were given preference in hiring. From these cases, the General Counsel concludes that where you have contracts governing the terms of hire, discriminatory treatment is not essential and that Section 8(a)(3) of the Act was violated. At page 19, in the brief, General Counsel states:

> '' * * * In short, where the contract in question governs the terms upon which hiring hall shall be conducted, evidence of specific discriminatory treatment is not essential to a finding that Sections 8(a)(3) and (b)(2) have been violated. The unfair labor practice is established if it can be shown that the hiring features of the contract 'tend * * * to encourage membership in a labor organization' * * *.''

General Counsel thus fails to sustain his alleged prerequisites by competent evidence.

General Counsel overlooks the fact that this proceeding is not only to stop an alleged discriminatory practice, but to secure back pay awards for Lewis from persons in no way responsible for the acts of Local 242 in the treatment of Lewis.

Beginning at page 19 of the N.L.R.B. brief, General Counsel argues that the hiring clause in controversy en-

courages union membership and attempts to support this assertion by the next assertion which, in substance, is that everybody knows that where hiring is delegated to a union, discrimination and encouragement of union membership will result. There is nothing, however, in the record to support this argument.

Again, beginning at page 25 of the N.L.R.B. brief, the General Counsel argues, in absence of proof, that we can assume that the hiring hall of Local 242 was so well known to building trade employees that they knew it would be useless to make direct job applications. Cyrus Lewis knew of the hiring hall. He went to the same voluntarily. He also apparently knew of his rights under the National Labor Relations Act of 1947; otherwise, he would not have so quickly found his way to the Board office to file charges. It is fair to assume that Lewis was more interested in back pay awards than work; that he knew employers could hire directly and if he had applied, might have secured work. The foregoing are assumptions, but there is as much right to assume things favorable to the employers in this suit as to assume things in favor of General Counsel's position in his brief.

Both the N.L.R.B. and the General Counsel seek to avoid rudimentary rules of law and evidence and to fill the void of lack of evidence with surmise and conjecture. The Board's position is summarized at page 37 of its brief:

> " * * * As the Board pointed out, 'Had (Lewis) gone directly to one of the Respondent Employers, he would unquestionably have been rejected summarily and referred to the union hall for clear-

> ance.' (F.R. 207). In short, the parties to the contract had made Local 242 their hiring agent with respect to all jobs covered by the contract, and under conventional agency principles, they may be held responsible for the Local's conduct. *N.L.R.B. v. Shuck,* 243 F.(2d) 519, 521-523 (C.A. 9); *N.L.R.B. v. Waterfront Employers,* 211 F.(2d) 946, 953-954 (C.A. 9). Indeed, the result would not be different even if, contrary to what we have shown, the hiring contract were valid. The agreement placed no restrictions upon Local 242's selection of applications for referral, and its discrimination in the performance of its task plainly was within the general scope of its authority so as to bind the principals on whose behalf it acted. * * * "

This statement continues the error repeatedly made by the Board and counsel to the effect that Mountain Pacific made Local 242 its agent with respect to all job referrals, in spite of the record to the contrary, namely:

(a) That Mountain Pacific acts for its members in negotiating agreements, it does not do any hiring. Each member does its own hiring, so as to the actual hiring practices, Mountain Pacific is not an agent of the employer (R. 100).

(b) That Mountain Pacific and its members do not requisition workmen from Local 242, so Local 242 could never be its agent (R. 99, 100).

(c) There is no evidence that Mountain Pacific members ever call for hod carriers much less that they use plaster in building highways, roads and dams requiring the use of hod carriers.

Again we wish to emphasize that the Chapters are

separate corporations and do not act as one body, or as agents for each other (R. 82).

The assumed futility of Lewis seeking direct employment is refuted by the record. Members of the A.G.C. Chapters do hire directly (R. 107 and R. 82-83).

Under the common law and the Constitution of the United States, persons, corporations or organizations cannot be charged with liability for a loss sustained by a person such as Cyrus Lewis unless the loss occasioned was proximately caused by the person to be charged or by an agent of that person. To hold otherwise would violate all concepts of law and the due process clause of the Federal Constitution.

CONCLUSION

It is, therefore, respectfully submitted that the trial examiner's decision as to the A.G.C. Chapters, particularly as to the Mountain Pacific Chapter, was correct, and that no Decree should issue enforcing the Board's Order as to the Mountain Pacific Chapter, and particularly that in no event should a back pay award be made against said Chapter.

Respectfully submitted,

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No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL–CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL–CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board to enforce its order (R. 47–51)[1] issued against respondents on December

[1] References to the printed record and to the supplemental printed record are designated "R." and "S. R.," respectively. References preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

14, 1957, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U. S. C., Secs. 151 *et seq.*), hereafter called the Act. The Board's Decision and Order (R. 47–51, S. R. 195–208) are reported in 119 N. L. R. B. Nos. 126 and 126A.[2] This Court has jurisdiction of these proceedings under Section 10 (e) of the Act, the unfair labor practices having occurred at Seattle, Washington, within this judicial circuit.

STATEMENT OF THE CASE

The Board found that the hiring provisions in the collective bargaining contract in effect between the respondent unions and the employer associations were violative of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act in that they vested the unions with exclusive control, without adequate safeguards against improper discrimination, over the recruitment and referral of employees for jobs with members of the employer associations. In addition, the Board found that Cyrus Lewis, an applicant for employment, had been discriminatorily denied referral to jobs under the hiring arrangement in violation of the same statutory provisions. Finally, the respondent local union was found to have attempted to compel Lewis to withdraw the unfair labor practice charge he had filed in this case by threats and promises relating to job opportunities, and thereby to have violated Section 8 (b) (1) (A) of the Act. The evidentiary facts upon

[2] The Board's opinion in this case was issued March 27, 1958, more than three months after entry of its decision and order, and is printed separately at S. R. 195–208.

which the foregoing findings are based may be summarized as follows:

I. The Board's findings of fact

A. The parties and their relationship

The employer associations in this case are chapters of the Associated General Contractors of America, each having a membership of persons and companies engaged in general contracting in the building and construction industry in the western part of the State of Washington (R. 9–10, S. R. 196; 184–188, 193, 211). The Seattle and Mountain Pacific Chapters [3] have their principal offices in Seattle. The members of the former are engaged primarily in building construction, and those of the latter primarily in highway and heavy construction (R. 9; 96–97). The Tacoma Chapter [4] has its office in Tacoma, but its members also sometimes receive contracts for construction work in the Seattle area (R. 9; 91–92).[5] Each of the Chapters is authorized by its

[3] The full name of the Seattle Chapter is "The Associated General Contractors of America, Seattle Chapter, Inc." The full name of the Mountain Pacific Chapter is "Mountain Pacific Chapter of the Associated General Contractors, Inc."

[4] The full name of the Tacoma Chapter is "Associated General Contractors of America, Tacoma Chapter."

[5] The members of each of the three respondent Chapters perform a substantial amount of construction work outside the State of Washington, and also for enterprises within that State whose operations have a substantial effect on interstate commerce (R. 10–11; S. R. 185–188, 193, 211–213). On the basis of such a showing as to the operations of its members, this Court affirmed the Board's exercise of jurisdiction over the Seattle Chapter in a case which, like the present case, involved the validity of the hiring arrangements then in effect between that association and respondent Local 242. *N. L. R. B.* v. *Shuck Construction Co.*, 243 F. 2d 519, 521. Accordingly, there is

membership to enter into collective bargaining agreements with labor organizations whose members are employed in the construction industry in Western Washington (R. 9–10; 78, 84, 91, 96, 97, S. R. 185, 187, 188, 190, 193, 211, 213). Customarily the Chapters negotiate such agreements jointly (R. 9–10; 79).

The two respondent Unions, hereafter called Local 242 [6] and the District Council,[7] are labor organizations with which the three respondent Chapters deal with respect to laborers and hodcarriers hired by the Chapters' members (R. 12; 80, 99). The District Council is comprised of various locals of the International Hodcarriers, including Local 242, and represents such locals in the negotiation of collective bargaining agreements covering their members (R. 12; 79, 84, 86–87, 91–92, 93, 95, 97, 178). Local 242's membership lies within the area in which the employer members of the three respondent Chapters are engaged in construction work (R. 12, 14; 84, 86–87, 91, 93, 94–95, 97, 105–107, 160, 171, 178).

B. The hiring agreement between the respondent Unions and employer Associations

On December 30, 1955, the Chapters, jointly acting for their members, executed a collective bargaining contract with the District Council covering, *inter alia,* employees working within the jurisdiction of Local

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no merit to the allegations in the petitions for review filed in this Court by the Seattle and Mountain Pacific Chapter that they are not subject to the Board's jurisdiction (R. 69, 74).

[6] International Hodcarriers, Building and Common Laborers Union of America, Local 242, AFL–CIO.

[7] Western Washington District Council of International Hodcarriers, Building and Common Laborers Union of America, AFL–CIO.

242 (R. 12; 79, 178–180). The agreement covered a two-year term and went into effect on January 1, 1956 (R. 12–13; 178).

The provisions of the contract relating to hiring were as follows (S. R. 196, R. 13; 178–179):

> (a) The recruitment of employees shall be the responsibility of the Union and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.
>
> (b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.
>
> (c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours * * * the Employer may procure workmen from other sources.

Pursuant to these terms Local 242 maintains, as it has for many years, a hiring hall to which the employer members of the respondent chapters submit requests for employees when job openings occur within Local 242's jurisdiction (R. 14; 120–121, 128–129). The employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242's hiring hall in this manner during the events in this case (S. R. 197, 206, 207; R. 105, 109–110, 137–138, 142–146, 148, 151–153, 157, 165, 168–169, 171, 174). Indeed, the terms of jobs in the building and construction industry are often short, with the result

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that Local 242's hiring hall receives a fairly constant rate of requests for employees during the peak of the building season in the late spring and summer months (S. R. 197, 206, 207; R. 101–102, 109–110, 124, 127–128, 142–146, 148, 151–153, 157, 161–162, 165, 168, 174. Applicants for jobs register with the hiring hall, and are present at the hall in the early morning hours in order that they may be dispatched as employer requests are received (R. 14; 163). Referrals are ordinarily made on a rotation basis—the applicant longest unemployed is the first dispatched—except when employers request specific individuals. In no event, however, is a non-member of Local 242 referred to a job in preference to a member (R. 14, 15; 121–122, 124, 136, 175–176, 177). Non-members are sometimes sent out on jobs but not until it has been ascertained that a member is not available (S. R. 197, R. 14–15; 121–122, 124, 128, 175–176). This practice accords with the constitution of the International Union with which Local 242 is affiliated, which requires the dispatcher at the hiring hall, a union official, to do all in his "power to procure employment for * * * [members] in preference to any and all non-union men" (R. 15; 124–126, 175, 176).

C. The discriminatory treatment of Cyrus Lewis under the provisions of the hiring agreement

Cyrus Lewis, a hod carrier for 20 years, had been dropped from membership in Local 242 in about 1950 for non-payment of dues (R. 15, S. R. 206; 129, 141–2, S. R. 213–214). On March 15, 1956, he asked for work at the hiring hall and was told that none was available (R. 16; 161, S. R. 214). During the next 7 or 8 weeks he

came back 2 or 3 times each week, to be told repeatedly that there was no work, although on many of these occasions the Local dispatched other hod carriers to jobs (R. 16; 118, 141–142, 156, 163–165, S. R. 214, 216, 221). During this period Lewis sought reinstatement in Local 242, but was told by Leo Allman, the corresponding secretary and hiring hall dispatcher for the Local, that "there weren't any jobs" and that the Local "wouldn't take any new members" (S. R. 206, R. 16, 17; 126, 141–142, 143, 144, 171–172, S. R. 215).

On May 9, 1956, Lewis applied for a job directly with a contractor who was not a Chapter member and was put to work on a job that lasted the remainder of the day (S. R. 206, R. 17–18; 138, 140, S. R. 216). Later that day, however, the business agent of Local 242 appeared at the project and, upon observing Lewis at work, threatened the contractor with a picket line unless he hired only union members (S. R. 206, R. 18; 118–120, 139, S. R. 216–217).

A few days thereafter Lewis returned to the hiring hall and once again asked Allman to dispatch him to a job. (S. R. 206, R. 18; 120, S. R. 217). Allman replied that he had heard that Lewis had filed the unfair labor practice charge herein against the union; that the union was not going to give him "a damned thing"; and that Lewis should "get out and stay out" (S. R. 206, R. 18; S. R. 217). Disregarding this rebuff, Lewis returned to the hiring hall early on May 17 and stationed himself at the dispatcher's window (S. R. 206, R. 19; 132, S. R. 217–218). Although a number of hod carriers who came in later were dispatched to jobs, Lewis was not referred (*ibid.*). During the morning,

however, Lewis learned that a request had been received from a shipyard for a hod carrier, and asked Allman for the job. At that time Lewis was the only hod carrier in the hall (R. 19; 159, 168–170, S. R. 218). Allman denied that the job was for a hod carrier, and refused to refer Lewis, but shortly thereafter a hod carrier came into the hall and Allman referred him to the shipyard (R. 19; 132, 171, S. R. 218–219).

Later that day a Board field examiner telephoned Allman at the hiring hall, stating that Lewis had complained that Local 242 was discriminating against him (R. 19–20; 119–120, S. R. 220–221). Shortly after the call, Allman told Lewis that he would dispatch Lewis but that Lewis should withdraw the unfair labor practice charge which he had filed (R. 19–20; 134–135, 156, S. R. 219). When Lewis told him that he would see what he could do about it, Allman gave him a referral to a job which lasted several days (R. 20; 142–143, 155, 157, S. R. 219).

When the job had ended Lewis returned to the hiring hall seeking further work. Allman inquired whether Lewis had withdrawn the charge (R. 20; 133–134, S. R. 221). Lewis replied in the negative, whereupon Allman turned to the union's business agent, who was also present, and remarked, "Lewis didn't do what we told him to do" (*ibid.*). The business agent responded, "the hell with him," and Allman told Lewis "You didn't go down and withdraw the charge like I told you to, so you can get out and stay out as far as I am concerned" (*ibid.*). Lewis nevertheless returned the next day, and Allman again told him that he had been dispatched on May 17 on the assumption that he would withdraw his charge, but that

the Local would not refer him again until he withdrew it (R. 20; S. R. 221).

During the ensuing weeks Lewis appeared regularly at the hiring hall but was unsuccessful in obtaining employment until June 13, when Allman, without explanation, referred him to a job that lasted about a week (R. 20; 143–145, S. R. 221). Again, on July 11, Lewis was dispatched to a job lasting nearly a month, and on August 18 Allman gave Lewis an "Official Receipt" form which served as the equivalent of a membership book for referral purposes (R. 21; 145–146, 150, 173). During this period Lewis made further attempts to rejoin Local 242, and pay the required fees and dues (R. 20–21; 147, 154). Allman, however, continued to refuse him membership unless he received a statement from the Board that Lewis had withdrawn the unfair labor practice charge. (R. 20–21; 142–143, 147–148, 173). On two occasions Allman appeared at job sites where Lewis was working, to "see if you would withdraw the case, if you want to keep working" (R. 22; 152–153, S. R. 222, 223). Allman pointed out that although other such charges had been filed against Local 242, "we have given the boys [who filed them] work and they have withdrawn the cases" (R. 22, S. R. 223). Lewis replied on these occasions that the matter was out of his hands, and that Allman should discuss the subject with Board officials R. 22–23; 152–153, S. R. 222).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded, one member dissenting, that the hiring provisions of the

contract between the respondent unions and employer associations are violative of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act. In the Board's view, the contractual control given to Local 242 in the circumstances of this case to select applicants to be referred to jobs, in the absence of any safeguards against union favoritism in the exercise of that control, falls within the statutory proscription against encouragement of union membership and coercion of applicants in the exercise of their right not to adhere to union rules or membership requirements (S. R. 197–198).[8]

In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs. The Board found that Lewis "was a clear victim of the unlawful hiring system," and that therefore all respondents were responsible for the discrimination against him (S. R. 205–206). Finally, the Board concluded, also unanimously, that Local 242 had violated Section 8 (b) (1) (A) of the Act by attempting to compel Lewis to withdraw the unfair labor practice charge in this case by threats and promises respecting job referrals (S. R. 195–196).

To remedy the foregoing violations the Board's order requires all respondents to cease and desist maintaining or giving effect to the unlawful hiring

[8] Only Local 242 was found to have violated the Act by its execution of the agreement, for it is the only respondent against whom a charge was filed within the six month limitation period from the date of execution, as required by Section 10 (b). The Board's finding as to the remaining respondents is premised on their maintaining the agreement in effect (S. R. 205).

provisions of the contract, and from in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. In addition, the respondent unions are required to cease and desist from causing or attempting to cause unlawful discrimination in employment. Affirmatively, the respondent employer associations and unions are required to notify one another in writing, that neither has any objection to the employment of Lewis or any other employee who is not a member of a labor organization. Further, all respondents are required to make Lewis whole for losses in wages suffered by reason of the discrimination against him, and to post appropriate notices. (R. 47–51.)

SUMMARY OF ARGUMENT

I

The Board correctly found that the exclusive hiring agreement in this case is unlawful under Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act.

A. The single issue presented with respect to the Sections 8 (a) (3) and (b) (2) findings of the Board is whether the effect of the hiring provisions of contact between respondents was "to encourage membership in any labor organization" within the meaning of Section 8 (a) (3). The remaining prerequisites to an unfair labor practice finding under these provisions—that there be a showing of "discrimination in regard to hire * * * or condition of employment," and that the Union be responsible for causing the

employer to so discriminate—are satisfied, under settled law, by the existence of an agreement between the employer and the Union providing for exclusive hiring procedures.

Encouragement of union membership results from the hiring agreement in this case, in the first instance, because Local 242 is given unrestricted authority to make job referrals on whatever basis it wishes. Job applicants may reasonably expect from this circumstance alone that employment opportunities will depend on their compliance with union policies and practices. Moreover, as employees well know, hiring halls traditionally have been operated primarily for the benefit of union members, and in the absence of effective assurances to the contrary, employees may be expected to assume that such an arrangement is intended to operate in that fashion. This is particularly true in this case, for in the building and construction industry the hiring hall and the closed shop have long been regarded as synonomous, even in the years following the 1947 amendments to the Act. Finally, preference for union members was in fact practiced in Local 242's hiring hall. From all of these circumstances, encouragement of union membership, at least in the sense of encouraging adherence to union rules and support of union activities, could reasonably be inferred from the maintenance by respondents of their hiring agreement.

The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful. Where it can be shown that employees may reason-

ably expect that referrals to jobs will be made without regard to whether they are union members or comply with union policies, there is no premise for an inference of unlawful encouragement of union membership. Accordingly, it is entirely possible for parties to hiring agreements to take appropriate steps, which are indicated in the Board's decision, in order to neutralize the improper effects the enforcement of their agreement otherwise might have on job applicants, and thereby avoid illegality altogether.

B. The hiring agreement in this case is independently violative of Sections 8 (a) (1) and (b) (1) (A) of the Act. Under these provisions, neither discrimination in hiring nor encouragement of union membership need be shown; it is enough, that enforcement of the agreement have the effect of restraining employees in their right to refrain from union activities. Such unlawful restraint is established in this case by the showing that job applicants could reasonably feel that employment opportunities depended on their good standing with Local 242. Here again, it is open to the parties to hiring agreements to eliminate the improper restraining effects on employees of their hiring procedures by giving employees effective assurances against discrimination, as specified in the Board's decision.

II

The Board's conclusion that Cyrus Lewis was discriminated against in violation of Sections 8 (a) (3) and (1) and (b) (2) and (1) (A) of the Act is established (1) by the fact that Lewis was denied job referrals pursuant to an unlawful agreement, and

(2) by the independent showing that the reason for Local 242's refusal to refer Lewis was his nonmembership in that Union. All parties to the contract are responsible for the violation as to Lewis, for they agreed in the contract to delegate full hiring authority to Local 242, and the discriminations against Lewis was effected by Local 242 within the scope of that authority.

III

Local 242 filed no exceptions to the Trial Examiner's finding that it had violated Section 8 (b) (1) (A) by threatening and making promises to Lewis respecting job referrals for the purpose of compelling him to withdraw an unfair labor practice charge filed by him against the Union. Accordingly, under Section 10 (e) of the Act, Local 242 is precluded from contesting that finding before this Court. In any event this finding is amply supported by the evidence.

ARGUMENT

I. The Board correctly found that the hiring agreement in this case is unlawful

Introductory statement.—The abolition of all forms of compulsory unionism, save for a qualified form of the union shop, was a major objective of the 1947 amendments to the Act. *Radio Officers Union* v. *N. L. R. B.,* 347 U. S. 17, 40–42; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 5–7, I Leg. Hist. 411–413.[9] Congress was fully aware, moreover, that the union-

[9] "Leg. Hist." denotes the two volume work, *Legislative History of the Labor Management Relations Act, 1947* (Gov't Print. Off., 1948).

controlled hiring hall was one of the principal devices by which compulsory union membership had been effected. Thus, Senator Taft stated on the floor of the Senate, "Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them." 93 Cong. Rec. 3836, II Leg. Hist. 1010.[10] Decisional experience shows moreover, that hiring hall arrangements like the present one have continued, irrespective of the passage of the 1947 amendments to the Act, to be used for discriminatory purposes.[11]

As the Board has pointed out in its decision (S. R. 201–202), however, the operation of a hiring hall need not inevitably involve a statutory violation, i. e., unlawful encouragement of union membership (Sections 8 (a) (3) and 8 (b) (2)), or improper restraint upon employees' freedom to refrain from adherence to union rules (Sections 8 (a) (1) and 8 (b) (1) (A)). Cf. *N. L. R. B.* v *Swinerton,* 202 F. 2d 511, 514, certiorari denied 346 U. S. 814, discussed more fully *infra,* pp. 19–21. Hiring halls can perform their useful and permissible function of providing an efficient and fair method for the recruitment of personnel without having a discriminatory or coercive effect on the employees who must utilize such halls in order to find employment. This may be accom-

[10] See also S. Rep. 105, 80th Cong., 1st Sess., p. 6, I Leg. Hist. 412; 93 Cong. Rec. 4885, II Leg. Hist. 1420.

[11] See, e. g., the Eighteenth, Twentieth and Twenty-second Annual Reports of the Board (G. P. O. 1953, 1955, 1957), at pp. 41, 86, and 73, respectively. See also the court decisions cited *infra,* pp. 17–18.

plished, however, only where employees need not fear that their success in being referred to jobs is dependent upon compliance with the membership rules of the union which operates the hiring hall. In adjudging the lawfulness of the hiring agreement in this case, therefore, the Board's task was to "use * * * its judgment and its knowledge" to distinguish the licit from the illicit factors that inhere in union-operated hiring arrangements. *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348, quoting from *Chicago, etc. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598. We show below that the Board's analysis comports both with the statutory provisions and with the realities of hiring practices and requirements in the building and construction industry to which the agreement in this case relates.[12]

[12] The legality of hiring halls under the Act has not been comprehensively treated by the Board in its decisions prior to this case. In the majority of cases involving a hiring hall, decision has rested on the existence of discriminatory practices apart from the effect of the contract. See cases referred to in the Annual Reports at n. 11, *supra*. The dicta relating to this issue that has appeared in earlier Board cases, however, do not appear to reflect a consistent position. Compare *Hunkin-Conkey Const. Co.*, 95 N. L. R. B. 433, 435, with *The Lummus Co.*, 101 N. L. R. B. 1628, 1631, n. 8. In *National Union of Maritime Cooks and Stewards*, 90 N. L. R. B. 1099, the Board declined to find an unfair labor practice based upon a union's insistence upon a union-operated hiring agreement, but the proposed contract in that case appeared substantially to meet the requirements for safeguards against discrimination that would render it valid under the present decision. See 90 N. L. R. B. at 1101, and the discussion at pp. 28–31, *infra*.

A. The hiring hall agreement in this case falls within the proscription of Sections 8 (a) (3) and 8 (b) (2) of the Act

1. *The issue in terms of the statutory language*

Sections 8 (a) (3) and 8 (b) (2) of the Act, subject to an express qualification not material here, are designed to protect employees against compulsory unionism. The latter provision forbids unions to "coerce or attempt to cause an employer to discriminate" in violation of the Section 8 (a) (3), which in turn makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The prerequisites to a finding that these Sections have been violated, thus, are a showing (1) of discrimination respecting employment for which the employer and union are responsible, and (2) that such discrimination encourages or discourages union membership.

In accordance with these principles it is settled law that the execution and maintenance of an exclusive hiring agreement between an employer and a union which encourages union membership within the statutory meaning is violative of both Section 8 (a) (3) and (b) (2). For example, a violation of these provisions may, and frequently has been premised upon the existence of a collective bargaining agreement which requires that preference be given to union members in hiring. See, e. g., *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521 (C. A. 9); *N. L. R. B.* v. *Daboll,* 216 F. 2d 143, 145 (C. A. 9), certiorari denied, 348

U. S. 917; *N. L. R. B.* v. *Sterling Furniture Co.,* 202 F. 2d 41, 42 (C. A. 9); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B.* v. *Philadelphia Iron Works,* 211 F. 2d 937, 941 (C. A. 3). In expressly restricting employment to union members, such agreements plainly encourage union membership, and in subscribing to such agreements both the employer and union make themselves responsible under the Act. And the further requirement of Section 8 (a) (3) that there be a showing of discrimination in regard to hire or condition of employment is satisfied by the existence of the agreement itself; no evidence of an actual refusal to hire or a discharge is necessary. See cases cited *supra,* p. 17–18. This may be explained on either of two grounds. First, the existence of a contract requiring union membership, without respect to its enforcement, imposes a discriminatory "condition of em-employment" within the statutory meaning. Cf. *N. L. R. B.* v. *Local 803 Boilermakers Union,* 218 F. 2d 299, 302–303 (C. A. 3); *N. L. R. B.* v. *McGraw & Co.,* 206 F. 2d 635, 641 (C. A. 6). Secondly, non-union applicants and employees affected by such a contract may reasonably conclude that to apply for employment, or to retain their non-member status if already employed, would be a "futile gesture," and are therefore excused from testing the matter. *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 952 (C. A. 9). See also, *N. L. R. B.* v. *Swinerton,* 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Local 420, Plumbers Union,* 239 F. 2d 327, 331 (C. A. 3); *N. L. R. B.* v. *Lummus*

Co., 210 F. 2d 377, 381 (C. A. 5). In short, where the contract in question governs the terms upon which hiring shall be conducted, evidence of specific discriminatory treatment is not essential to a finding that Sections 8 (a) (3) and (b) (2) have been violated. The unfair labor practice is established if it can be shown that the hiring features of the contract "tend * * * to encourage membership in a labor organization." *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521 (C. A. 9).

From the foregoing it is apparent that the legal issue respecting the Board's Section 8 (a) (3) and (b) (2) findings in this case is a narrow one. The hiring hall operated by Local 242 was established under an agreement between the respondent unions and employer associations which provided for exclusive hiring procedures; all applicants who failed to observe them were to be denied employment. Thus, the required showings under Sections 8 (a) (3) and (b) (2) relating to union and employer responsibility and discrimination in regard to hire or condition of employment have been made.[13] The remaining question, then, is whether the impact of these procedures, in the circumstances of this case, may fairly be said to have encouraged union membership within the meaning of Section 8 (a) (3) of the Act.

2. The Board properly held that the hiring agreement between the respondents had the effect of encouraging union membership within the meaning of the Act

(a) In *N. L. R. B.* v. *Swinerton,* this Court expressed the view that the "adoption of a system of

[13] See *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 39: a "* * * refusal to hire for an available job * * * [is] clearly discriminatory."

union referral or clearance" did not of itself unlawfully encourage union membership, and that to establish a violation it was necessary to show "that the union in fact discriminated in favor of its members" 202 F. 2d at p. 514. The Court reasoned that to hold otherwise "would in practical effect shift the burden of proof" which the proponent is required to carry with respect to all elements of the violation. *Ibid.*

On its face, this statement in which other courts have expressed concurrence,[14] would require a finding that all hiring hall arrangements, including the one in this case, are valid so long as they do not expressly give preference to union members, irrespective of whether the surrounding circumstances in a particular case show that employees could reasonably construe the arrangement, to require them to forego their statutory rights. We do not believe that so sweeping a reach was intended by the Court. There can be no quarrel, of course, with the requirement that the burden of proof respecting unlawful encouragement of union membership be sustained by the proponent of the case. We believe, however, that this requirement may be satisfied, and we show below that it has been

[14] See *Eichleay* v. *N. L. R. B.*, 206 F. 2d 799, 803 (C. A. 3); *N. L. R. B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943 (C. A. 3); *Webb Construction Co.* v. *N. L. R. B.*, 196 F. 2d 841, 845 (C. A. 8); *N. L. R. B.* v. *McGraw*, 206 F. 2d 635, 640 (C. A. 6). In addition, this Court has repeated the substance of its remarks in *Swinerton* in *N. L. R. B.* v. *ILWU Local 10*, 214 F. 2d 778, 781, and *N. L. R. B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 157, certiorari denied, 348 U. S. 871.

satisfied here, by a showing that the sum of the circumstances attending the adoption and maintenance of a particular hiring hall are such that even absent a preference clause the arrangement has the forbidden effect of unlawfully encouraging union membership. Nothing stated in *Swinerton* requires the conclusion that the burden of showing a violation cannot be met in this manner. And, in counterpoint, nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance, no showing of unlawful encouragement can be made. See pp. 28–30, *infra*.

To the extent, however, that the Court in *Swinerton* meant that its statement should have a broader reach than we have attributed to it, we believe that the Court may wish to re-examine the question in the light of the considerations advanced below. These considerations were not before the Court in *Swinerton,* nor have the reasons in support of the Board's decision in this case been presented to any of the courts whose general language may be taken to suggest that a hiring hall agreement is always valid, whatever the background circumstances, so long as there is no express preference clause.

(b) In showing that the hiring hall arrangement in this case unlawfully encouraged "membership in [a] labor organization," it is well at the outset to restate the established meaning and scope of the statutory term "membership." The coverage of this phrase includes, but is not restricted to, enrolled union membership. That is, it is not a prerequisite to a violation of

Section 8 (a) (3) that the activity in question be specifically designed to encourage an employee to sign up as a union member. Rather "membership" embraces generally "participation in union activities," and adherence to union principles in order to "stay in good standing in a union." *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 40, 42. See also *N. L. R. B.* v. *Local 542, Operating Engineers,* decided May 28, 1958, 42 LRRM 2181, 2182 (C. A. 3). This comprehensive definition fulfills the Act's policy "to insulate employees' jobs from their organizational rights," for by so reading Section 8 (a) (3), an employee is enabled, under the protection of that Section "to join in or abstain from union activities without thereby affecting his job" (*Radio Officers, supra,* at pp. 40, 42). Accordingly, the hiring hall in this case falls afoul of Section 8 (a) (3) if the Board could reasonably infer that its existence and operation improperly encouraged "subservience to union activity" or conformity "with such rules and policies as unions are likely to enforce," as well as enrolled membership (*infra,* p. 27).

The effect of the hiring hall agreement in this case on job applicants in terms of encouraging their adherence to union policies and rules may be shown in a number of ways. In the first place, as the Board observed, the hiring agreement calls for a "complete and outright surrender of the normal management hiring prerogative to [the] union" (S. R. 196). Thus, the agreement states simply that "the recruitment of employees shall be the responsibility of the Union" (S. R.

196, R. 178).[15] No criteria or methods are specified by which referrals are to be made by the Union. That essential and fundamental matter, in view of the statutory rights of the employees, is left to the unilateral and uncontrolled discretion of the union operating the hiring hall—here, Local 242. Insofar as the contract is concerned, no inhibition is placed even upon preferential treatment of union members. In practical terms, job applicants are in effect advised by the hiring agreement that whether they are referred to jobs will depend solely on Local 242's disposition toward them. For Local 242, in the words of the Board is "free to pick and choose on any basis it sees fit (S. R. 198). From this circumstance alone, "it is difficult," as the Board stated (*ibid.*):

> * * * to conceive of anything that would encourage [employees'] subservience to union activity, whatever its form, more than this kind of hiring hall arrangement. Faced with this hiring hall contract, applicants for employment may not ask themselves what skills, experiences or virtues are likely to win them

[15] The further provision in the agreement permitting employers to hire from sources other than the hiring hall if the Union does not supply applicants within 48 hours of request in no practical way qualifies the exclusiveness of the Union's control over hiring. Manifestly, the contract gives notice to an applicant seeking employment from an employer bound by its provisions that the only practical way to obtain work is through the hiring hall. And, as observed by the Board, the frequency of short term hirings by the employers involved in this case places the Union in "perpetual control" over job opportunities for applicants who must, as a practical matter, return to the hiring hall at the end of each job if they are again to find work (S. R. 197, n. 2).

> jobs at the hands of AGC contracting companies. Instead their concern is and must be: what, about themselves will probably please the unions or their agents; how can they conduct themselves best to conform with such rules and policies as unions are likely to enforce; in short, how to ingratiate themselves with the union, regardless of what the employer's desires or needs might be.

Encouragement of applicants to comply with union policy and practices, moreover, does not derive alone in this case from Local 242's unfettered and unilateral control over hiring. Applicants wishing to utilize Local 242's hiring hall cannot realistically be expected to view its operation divorced from their understanding of and experience with hiring halls as they have traditionally operated. To the job seeker, an arrangement vesting plenary and arbitrary authority in a union to supply men for jobs constitutes a hiring hall in the manner that he has known halls customarily to exist and operate, at least in the absence of reliable safeguards to the contrary. And it cannot in fairness be gainsaid that union-operated hiring halls have from the time of their inception been operated primarily for the benefit of union members, and to the end that a firm discipline be exerted over employees and applicants. Certainly, this was the understanding of Congress when it enacted the 1947 amendments to the Act. See n. 10, *supra*. And as stated in a more recent Senate Report pertaining to maritime hiring halls, "the principal characteristic of the union hall * * * is that it obliges the employer to give pref-

erence in employment to union membership." [16] With respect to the control which unions, through hiring halls, have exercised over employee adherence to union policies and activities, Senator Taft pointed out during the debate on the 1947 amendments to the Act that "Such an arrangement gives the union tremendous power over the employees. * * * A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field." [17] And this Court has observed that "instances of discrimination [to enforce union policies through union control of a hiring hall are] extremely likely, if not inevitable." *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 954 (C. A. 9).

The employees affected by the hiring agreement in this case, moreover, could reasonably be expected to view the hiring hall not only in the light of the common knowledge as to the manner of its functioning, but more specifically, in the light of its established meaning in the building and construction industry. On this score there can be little doubt that the hiring

[16] S. Rep. 1827, 81st Cong., 2d Sess. (1950), p. 7.

[17] 93 Cong. Rec. 3836, II Leg. Hist. 1010. See also Joint Comm. Rep. 986, 80th Cong., 2d Sess., Part 3, p. 52, and Part 5, pp. 38–39. It is pointed out at p. 38 of Part 5 of this Report that from the time that the longshoremen's hiring hall on the west coast was established in 1934 until the date of the Report no non-union member was able to register for referral to jobs. The Report further makes clear that this is no more than to be expected from the fact that the union membership had to undergo a long struggle to win their demand for a hiring hall. The financial burden which may be incurred by unions in the operation of a hiring hall points to an additional reason for its operation to the exclusive benefit of its members.

hall and compulsory unionism are synonymous in the minds of employees in the building trades. As described in a recent study (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (U. Mich. 1956), p. 62) : [18]

> As a result of more than half a century of experience, the closed shop was firmly established in the building trades. * * * Building contractors, as well as the labor unions, had come to regard [hiring halls or referral systems] as an efficient and expeditious aid to the conduct of collective bargaining in the industry. As a result the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

There is no reason in this case to assume that the building trade employees within Local 242's jurisdiction looked upon its hiring hall as constituting anything other than a hiring hall within the accepted meaning of that institution in the building and construction industry. The agreement called for nothing else, and contained no provisions, even had the agreement been available for their inspection, that might disabuse the minds of job applicants of the natural conclusion that the operation of the hiring hall in this case was the same as that of others which had existed in

[18] See also, id, at pp. 64, 71; Bertram and Maisel, *Industrial Relations in the Construction Industry* (U. Calif., 1955), pp. 37–38, 45–47; Edelman, *Channels of Employment* (U. Ill.), p. 73; Joint Comm. Rep. 986, 80th Cong., 2d Sess., Part 1, p. 25.

the past.[19] In view of the uncontrovertible history of the nexus between the closed shop and hiring hall in this industry, we think it plain that employees could reasonably infer from the mere existence of the hiring hall that "the union will be guided in its [referral practice] by an eye towards winning compliance with a membership obligation or union fealty in some other respect" (S. R. 200).

Finally, it should not be overlooked that, notwithstanding the noncommittal language of the contract between respondents, Local 242 in fact followed the practice of favoring union members in making job referrals (*supra*, p. 6).[20] It may be assumed that job applicants were not blind to this circumstance. Local 242's actual practice could serve only to confirm the realistic assumption that employees would naturally entertain from the mere existence of its hiring hall, that conformity with Local 242 union policies was a prerequisite to job referral.

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[19] As recently as 1953, at least, Local 242's hiring hall was operated under an agreement which expressly provided for union preference. See *N. L. R. B.* v. *Shuck*, 243 F. 2d 519, 520 (C. A. 9).

[20] Such a practice is clearly violative of the Act, irrespective of the presence of nondiscriminatory contract language. See, e. g., *N. L. R. B.* v. *Local 743, Operating Engineers*, 202 F. 2d 516, 518 (C. A. 9); *N. L. R. B.* v. *Swinerton*, 202 F. 2d 511, certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Local 420, Plumbers Union*, 239 F. 2d 327, 330 (C. A. 3). In view of its more comprehensive holding respecting the hiring agreement in this case, however, the Board did not base its unfair labor practice findings or its remedial order on the discriminatory practices generally, apart from its finding and order respecting Lewis (R. 45–51, S. R. 197).

In view of all these circumstances we believe the Board could properly conclude that maintenance of the hiring agreement in this case, since it permitted "unfettered union control over all hiring" (S. R. 201), of itself encouraged employees "to join in [Local 242's] activities," if not, indeed, to become enrolled members. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 1, 42. As we have shown, nothing more is required to sustain the Section 8 (a) (3) and (b) (2) findings of the Board in this case.

(c) In view of the prevalence and importance of union referral systems in many industries, including the industry involved in this case, the Board has made clear that the vice in the hiring hall agreement between respondents is not inherent in the concept of hiring halls, and that its holding herein does not require the conclusion that all such arrangements are invalid (S. R. 201–205). Rather, the finding of invalidity here is premised solely on the deterrent effect the hiring hall in this case may have, particularly in view of the unfettered union control over the hiring process, upon the exercise by employees of their statutory rights to abstain from union activities. In the Board's view, accordingly, appropriate affirmative action by the contracting parties to neutralize the improper effects of a union hiring hall will eliminate those aspects of the system which place it afoul of the Act. Thus, hiring halls which may fairly be regarded by employees as offering them job referral opportunities based upon objective standards or criteria and wholly without reference to whether they are union members or comply with union policies and

practices cannot be said improperly to encourage union membership.[21]

Applying this principle, the Board has indicated that a hiring agreement may in itself be legitimate, even when it vests in the union the authority to refer applicants to jobs, if it explicitly provides, *inter alia* (1) that such referrals will not be based on union considerations but on objective criteria or standards, (2) that the employer retains the right to reject any applicant referred by the union, and (3) that the parties to the agreement post in appropriate places for scrutiny by job applicants "all provisions relating to the functioning of the hiring arrangement," including the above guarantees (S. R. 202–203). Satisfaction of the first of these requirements, when posted, serves to disabuse employees of the assumption that they must please the union to obtain employment. The second lessens the control of the union over the hiring function, and thereby the power to act arbitrarily toward job applicants. And by informing employees of the "provisions relating to the functioning of the hiring agreement," the third requirement puts employees on notice of the nondiscriminatory criteria or standards which the parties have agreed upon to govern referrals to jobs, and thereby gives substantive content to the guarantee against discrimination.[22] For it precludes the instant situation where "applicants for em-

[21] Cf. the statement of Senator Taft's views in S. Rep. 1827, 81st Cong., 2nd Sess. (1950), pp. 12–16.

[22] Some minimal "encouragement of union membership," within a literal meaning of that phrase, may remain from the mere fact that employees must apply for jobs through a union even if the guarantees prescribed by the Board are present. As the

ployment may not ask themselves what skills, experience or virtues are likely to win them jobs" (S. R. 198). Employers and unions who desire to operate non-discriminatory hiring halls scarcely may complain of these requirements.

The adequacy or sufficiency of the foregoing provisions under particular contracts may present close questions to be decided in the circumstances of such cases. For example, a contract providing for hiring on a rotation plan in accordance with a registration list might be proper or improper depending on whether nonmembers have access to the registration list.[23] Similarly, the types of criteria or standards permitted to govern referrals, as well as the degree of specificity required respecting the statement in the agreement of such matters, may depend on varying circumstances relating to the overall effect which the particular hiring system may have on the employees involved.

These problems, however, are not presented here. No steps of any kind were taken by the respondents

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Board observed, however, this would not be enough to warrant a finding of a violation (S. R. 204–205). The Act does not reach every activity to which its words could literally apply. The requirements established by the Board for a valid hiring hall agreement represent a reasonable line between the kind of encouragement contemplated by Section 8 (a) (3) and literal forms of encouragement that are inevitable in any number of union activities but which are not prohibited. See *infra*, n. 26.

[23] By way of illustration, the consent decree of this Court in *N. L. R. B.* v. *Pacific American Shipowners Association, et al.*, No. 13386 (1952), establishes a hiring hall specifically providing for non-discriminatory referrals from a registration list which was carefully drawn up to include all qualified employees, irrespective of their membership status. See Appendix H of the decree, pp. 3–6. It may also be noted that the decree also provides for employer authority to reject applicants (*ibid.*, p. 8).

to indicate to the employees that the hiring system upon which they depended for employment was intended to operate in any way different from the discriminatory and coercive methods they were familiar with from experience. In short, the violation here is based on the Board's conclusion, which we submit is entirely reasonable in the circumstances of this case, that the hiring agreement in question deprived employees of their statutory rights, and not on the assumption that any hiring hall is in itself unlawful.[24]

B. The hiring hall agreement in this case is independently violative of Sections 8 (a) (1) and (b) (1) (A) of the Act

Sections 8 (a) (1) and 8 (b) (1) (A) of the Act prohibit an employer and union, respectively, from restraining or coercing employees "in the exercise of the rights guaranteed in Section 7." The latter Section in turn provides, in material part, that employees have the right "to form, join or assist labor organizations * * * and to engage in other concerted activities * * * and * * * to refrain from any or all such activities * * *." Thus, unlike Sections 8 (a)

[24] See *N. L. R. B.* v. *Teamsters Union*, 225 F. 2d 343 (C. A. 8), where the Court sustained the Board's conclusion that an agreement delegating unfettered and unilateral control over seniority to a union is in itself violative of the Act because it tends to encourage membership in the union. The Court stated: "We do not have any reason to doubt the general salutariness and soundness of this * * * view of the Board on such a contract provision, in relation to the purposes of the Act and the protection of employees' freedom of choice thereunder, or any basis otherwise to regard the Board's judgment in the matter as being wrong." (p. 347). Accord: *N. L. R. B.* v *Dallas General Drivers*, Local 745, 228 F. 2d 702 (C. A. 5).

(3) and (b) (2), violations of the provisions now under consideration do not depend on a showing of discrimination in hiring or conditions of employment, or encouragement of union membership. See pp. 17–19, *supra*. All that is required to sustain the Board's Section 8 (a) (1) and (b) (1) (A) findings is that the hiring agreement in this case had the effect of restraining employees in their right "to refrain" from assisting unions or engaging in union activities. For this reason, we do not understand that this Court's remarks in the *Swinerton* case (discussed at p. 19–21, *supra*) pertaining to the lawfulness of a hiring hall agreement are relevant to the present discussion. The Court in *Swinerton* was concerned with whether the burden of proving discrimination which encourages union membership—the requirement for finding a Section 8 (a) (3) violation—is satisfied where no more is shown than an exclusive hiring agreement which does not on its face require preference of union members. See 202 F. 2d at p. 514. As stated above, the burden of proof respecting violations of Sections 8 (a) (1) and (b) (1) (A) is significantly different.

The relevant distinction was made by this Court in *N. L. R. B.* v. *Reed,* 206 F. 2d 184. The Court there declined to find violations of Section 8 (a) (3) and (b) (2) where, although discrimination was shown, it concluded that the conduct in question did not encourage union membership. The same conduct, however, was found to be violative of Sections 8 (a) (1) and (b) (1) (A), since it had the

effect of deterring the exercise of the Section 7, right to "refrain * * * from assisting a labor organization." 206 F. 2d at p. 189.[25]

We have already shown (pp. 21–28, *supra*) that the hiring agreement in this case had the effect of depriving the job applicants who were required to use the services of Local 242's hiring hall, of any meaningful freedom to ignore union rules and policies. The short of the matter is, as shown, that applicants could reasonably feel that their employment depended on their good standing with Local 242. Accordingly, the prerequisites of Section 8 (a) (1) and (b) (1) (A) findings are fully satisfied. For conduct which has the effect of adversely threatening employment opportunities traditionally has been regarded as constituting "restraint and coercion" within the meaning of Sections 8 (a) (1) and (b) (1) (A). See e. g., *Capital Service, Inc.* v. *N. L. R. B.*, 204 F. 2d 848, 853 (C. A. 9), affirmed, 347 U. S. 501. And where, as here, such restraint is brought to bear in connection with the Section 7 right to refrain from supporting union policies or joining a union, the violation is spelled out. See

[25] In view of the Court's reliance in the *Reed* case, in making its findings respecting "encouragement of membership," upon *N. L. R. B.* v. *Teamsters Union*, 196 F. 2d 1 (C. A. 8), a case subsequently reversed *sub nom Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, the correctness of the Sections 8 (a) (3) and (b) (2) findings in the *Reed* case may be open to question. This, however, does not affect the validity of the distinction made by the Court that legal components of a violation of Sections 8 (a) (1) and (b) (1) (A) differ from those constituting a violation of Sections 8 (a) (3) and (b) (2).

N. L. R. B. v. *Reed*, 206 F. 2d at 189; *N. L. R. B.* v. *Local 1423, Carpenters' Union*, 238 F. 2d 832, 837 (C. A. 5).[26]

II. Substantial evidence supports the Board's finding that Cyrus Lewis was denied job referrals in violation of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act

Cyrus Lewis, as the Board concluded, "was a clear victim of the unlawful hiring system being carried on" under the contract between respondents (S. R. 206). Lewis repeatedly requested, and on each occasion was denied, referral from Local 242's hiring hall for a period of two months before he was finally dispatched to a short term job (*supra*, pp. 6–7). Other

[26] The steps which the Board has indicated may be taken to neutralize the coercive effects of a hiring agreement like that in this case (discussed as pp. 28–31, *supra*) would of course operate to remove such an agreement from the coverage of Sections 8 (a) (1) and (b) (1) (A) as well as Sections 8 (a) (3) and (b) (2). For the invalidity of hiring contracts under all of these sections arises out of their effects on employees—whether they improperly encourage union membership (Sections 8 (a) (3) and (b) (2)), or whether they improperly restrain employees (Sections 8 (a) (1) and (b) (1) (A)). When those effects have been reasonably eliminated, the source of the unlawfulness is no longer present. The proper adjustment to be made, it may be added, between preventing inroads on Section 7 rights and giving adequate recognition to the legitimate interests of both unions and employers in arriving at workable agreements respecting such matters as hiring, is primarily a task for the Board. See, e. g., *Truck Drivers Local No. 449* v. *N. L. R. B.*, 353 U. S. 87, 96; *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; *N. L. R. B.* v. *United Steelworkers*, 26 U. S. L. W. 4524, June 30, 1958. As stated *supra*, pp. 28–30, we believe the line which the Board has drawn in this case between valid and invalid hiring agreements to be reasonable in all respects.

applicants were continuously sent out as employer requests came in during this time (*ibid.*). Plainly, the principle of job rotation which Local 242 ordinarily followed was not applied as far as Lewis was concerned (R. 121–122, 176). And when Lewis was finally given work, it was only as an inducement to persuade him to withdraw the unfair labor practice charge filed by him in this case (*supra,* pp. 8–9).

In short, Local 242 utilized the hiring agreement between respondents, which conditioned access to jobs on dispatch from the hiring hall, to preclude Lewis from employment opportunities. This agreement, however, was unlawful. And it is settled law that such discrimination pursuant to an unlawful hiring agreement is violative of Sections 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act. See, e. g., *N. L. R. B.* v. *Daboll,* 216 F. 2d 143, 145 (C. A. 9), certiorari denied, 348 U. S. 917; *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 952 (C. A. 9); *N. L. R. B.* v. *Alaska Steamship Co.,* 211 F. 2d 357, 359–360 (C. A. 9); *N. L. R. B.* v. *Brotherhood of Carpenters,* decided October 9, 1958, 42 LRRM 2799, 2802 (C. A. 7); *N. L. R. B.* v. *McCloskey & Co.,* 255 F. 2d 6870–71, (C. A. 3).

Wholly apart from the hiring agreement, moreover, the evidence shows that the reason Lewis was not referred to jobs was that he had been dropped from membership in Local 242, a reason specifically made an improper basis for discrimination by the same

statutory provisions.[27] Indeed, the normal practice in Local 242's hiring hall was not to refer non-members, at least if members were available (*supra,* p. 6). Local 242's dispatcher at the hiring hall was fully aware of Lewis' non-union status; in fact, he rejected Lewis' frequent requests to be reinstated in Local 242, and continued to turn Lewis away on the pretext that there were no job openings (*supra,* pp. 7–9). Cf. *N. L. R. B.* v. *Dant & Russell,* 207 F. 2d 165, 167 (C. A. 9). Finally, openly disclosing that Lewis' lack of membership made him unacceptable to Local 242 and ineligible for referral, Local 242's business agent threatened to picket a contractor with whom Lewis obtained employment because the contractor, by hiring Lewis, had not kept "straight union men on the job" (R. 139). These circumstances amply support the conclusion that the discriminatory treatment of Lewis was attributable to his non-membership in Local 242. Cf. *N. L. R. B.* v. *Local 12, Operating Engineers,* 237 F. 2d 670, 674 (C. A. 9), certiorari denied, 353 U. S. 910.

The responsibility of Local 242 for the discrimination against Lewis is plain. It was Local 242's dispatcher, acting as a union official, who denied Lewis job referrals. The responsibility of the remaining respondents, the District Council and the three employer associations, may also easily be established. For these respondents were parties to the contract

[27] No union security agreement was shown to be in effect, nor could there have been such an agreement under the proviso to Section 8 (a) (3) that could justify the treatment accorded Lewis. Moreover, Lewis made several attempts to join Local 242 during the period he tried to use its hiring hall, but was refused membership (*supra,* pp. 7–9).

which delegated to Local 242 full and unrestricted authority to fill all jobs openings with the members of the associations. In such circumstances it is not material that the District Council and the employer associations may not have known of the particular discrimination against Lewis. Under the hiring agreement Lewis was compelled to apply for work through Local 242's hiring hall. As the Board pointed out, "Had [Lewis] gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance" (S. R. 207). In short, the parties to the contract had made Local 242 their hiring agent with respect to all jobs covered by the contract, and under conventional agency principles, they may be held responsible for the Local's conduct. *N. L. R. B.* v. *Shuck,* 243 F. 2d 519, 521–523 (C. A. 9); *N. L. R. B.* v. *Waterfront Employers,* 211 F. 2d 946, 953–954 (C. A. 9). Indeed, the result would not be different even if, contrary to what we have shown, the hiring contract were valid. The agreement placed no restrictions upon Local 242's selection of applications for referral, and its discrimination in the performance of its task plainly was within the general scope of its authority so as to bind the principals on whose behalf it acted. See, *A. Cestone Co.,* 118 N. L. R. B. 669, 670, enforced *sub nom N. L. R. B.* v. *Local 138, Operating Engineers,* 254 F. 2d 958; Restatement of the Law of Agency (Am. Law Institute, 1933), Secs. 216, 229 (f), 236 and Comment (b).

Finally, it is no defense to the finding that respondents unlawfully discriminated against Lewis that the

record does not show that there were specific job openings with identified members of the employer associations on the particular occasions that Lewis presented himself at Local 242's hiring hall and requested referral. The record establishes that the various members of the respondent employer associations made frequent use of Local 242's hiring hall during the months that Lewis was discriminatorily treated (*supra,* p. 5). Indeed, they were required by the contract to use the hall exclusively with respect to the recruitment of workers on jobs within Local 242's jurisdiction. In addition, the record establishes that Lewis was improperly denied referral to many job openings of which Local 242 was notified, including jobs with the contractors involved in this case (*supra,* pp. 6–8). No further showing is necessary to support the conclusion that Lewis was the "victim * * * of the discriminatory hiring policy." *N. L. R. B.* v. *Swinerton,* 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Cantrell,* 201 F. 2d 853, 856 (C. A. 9), certiorari denied, 345 U. S. 996; *Hamm Drayage Co.,* 84 N. L. R. B. 458, enforced 185 F. 2d 1020 (C. A. 5).

III. The Board properly found that Local 242, in violation of Section 8 (b) (1) (A) of the Act, attempted to compel Lewis by threats and promises to withdraw an unfair labor practice charge

Local 242 filed no exceptions to the trial examiner's finding that it had violated Section 8 (b) (1) (A) of the Act by both threatening and making promises to Lewis respecting job referrals in order to force him to withdraw the unfair labor practice charge he had filed against the union. Accordingly, the Board, in accord-

ance with its Rules,[28] treated this finding on the assumption that any objection to it had been waived, and adopted it without further discussion of the matter (R. 45).

Under settled principles, Local 242 is foreclosed from raising any question respecting the validity of this Section 8 (b) (1) (A) finding before this Court. Thus, Section 10 (e) of the Act provides that "No objection that has not been urged before the Board, its number, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No such extraordinary circumstances are apparent here. The strictures of Section 10 (e) therefore remove the correctness of the finding under discussion from the contested issues in this case. See e. g., *N. L. R. B.* v. *District 50, U. M. W.*, 355 U. S. 453, 463–464; *N. L. R. B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C. A. 9); *N. L. R. B.* v. *Pinkerton's Agency*, 202 F. 2d 230, 233 (C. A. 9).

Putting aside the applicability of Section 10 (e), moreover, the violation found against Local 242 based on its conduct in attempting to obtain the withdrawal of the charge is clearly correct. As shown *supra*, pp. 7–8, Local 242's immediate response upon learning that Lewis had filed the charge was to tell Lewis that Local 242 was not going to give him "a damned thing," and that he should "get out and stay out"

[28] Rule 102.46 (b), 29 C. F. R. 102.46 (b), reads:

"No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding."

(*supra*, p. 8). Later, when Lewis guardedly promised to see what could be done about withdrawing the charge, he was given his first job referral (*ibid.*). Cf. *N. L. R. B.* v. *Local 12, Operating Engineers,* 237 F. 2d 670, 764 (C. A. 9). Thereafter Lewis was alternately dispatched and refused referrals, in a manner, as the trial examiner observed, resembling "a carrot-and-stick procedure" (R. 22). The hiring hall dispatcher made clear to Lewis, in applying this technique, that withdrawal of the charge would result in more frequent referrals (*supra*, pp. 8–9).

From the foregoing it is clear that Local 242 exerted its control over job opportunities to Lewis for the purpose of forcing him to withdraw the charge. Such conduct is a plain restraint upon the exercise by Lewis of his Section 7 rights, and thereby a violation of Section 8 (b) (1) (A) of the Act (see pp. 31–32, *supra*). *Textile Workers Union* (*Personal Products Co.*), 108 N. L. R. B. 743, 749, enforced in pertinent part, 227 F. 2d 409, 411 (C. A. D. C.); cf. *N. L. R. B.* v. *Knickerbocker Plastic Co.,* 218 F. 2d 917, 919–920 (C. A. 9); *N. L. R. B.* v. *St. Mary's Sewer-Pipe Co.,* 146 F. 2d 995, 996 (C. A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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NOVEMBER 1958.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an em-

ployer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1958

No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
and on
PETITION FOR REVIEW OF SAID ORDER

BRIEF OF UNION RESPONDENTS JOINTLY ANSWERING BRIEF OF THE NATIONAL LABOR RELATIONS BOARD
and
BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATUTES

MISCELLANEOUS

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BRIEF OF UNION RESPONDENTS JOINTLY ANSWERING BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

and

BRIEF IN SUPPORT OF PETITION FOR REVIEW

I.

STATEMENT OF THE CASE

A. Proceedings.

1. *Charges Of Unfair Labor Practice.*

Cyrus Lewis filed his charge against Local 242 on May 11, 1956, within the 6-months' limitation of the execution of the Labor Agreement, but the charge was not based on the agreement or its implementa-

tion. Instead, it alleged discriminatory practices by Local 242 with "various construction companies."[1]

Thereafter, Lewis filed charges against the AGC-Chapters and the District Council alleging violations of the discrimination and coerce-restrain provisions. None of the charges alleged any violation from the "execution" of the agreement.

2. *The Consolidated Complaint.*

The Complaint was isued on September 20, 1956 which alleged in paragraph VII that the agreement was since the date of its execution "published, maintained and continued in effect" by all respondents; in paragraph XI, the AGC-Chapters were alleged to have violated only Sec. 8 (a) (1) of the Act, thus abandoning the allegation of a violation of Sec. 8 (a) (3)[2]; in paragraph XII the Council was alleged

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[1]The Charge did not allege the existence of any labor agreement, nor the execution of any agreement by Local 242 nor identify the AGC-respondents:

"In keeping with an illegal hiring hall arrangement, the International Hod Carriers, Building and Common Laborers Union, Local 242, AFL-CIO, has since on or about February, 1956, refused to place on the hiring or referral list for employment, thereby discriminating against Cyrus Lewis in regard to hire with various construction companies in the Seattle, Washington area. In view of the hiring arrangement, it would be futile to apply for employment without being referred by the Union."

The name of the employers was stated thus: "Various construction companies."

[2]This paragraph alleges:

"XI

"The AGC Chapters, during the six-month period prior to the filing of charges by Lewis, and since then, (1) by continuing the 1956 Agreement in effect with the Council, wherein it was provided that member local unions of the Council were to function as the employment recruiting office and hiring hall of the employer members of the AGC Chapters, in the absence of providing affirmative assurances against discrimination in the selection of employees for hire, and by continuing the 1956 Agreement in effect

to have violated both the discrimination and coerce-restrain provisions "by continuing the 1956 agreement in effect under the circumstances and in the manner specified in paragraph XI"; and in paragraph XIII alleging that Local 242 has "since January 1, 1956, by continuing the agreement in effect" violated both the discrimination and coerce-restrain provisions.

It is noted that the allegations implicating all of the respondents, to-wit, paragraphs XI, XII, and XIII do not charge the execution of the agreement as being violative of the Act; that the AGC-Chapters are not accused of discriminating against Lewis; and that the maintenance of the alleged illegal agreement is violative of the discrimination provision and derivitively, but not independently, violative of the coerce provisions. The subject matter of the complaint is limited to the agreement between the Chapters on one hand, and the Union and District Council on the other hand; to alleged implementation of the contract between the Union and AGC-affiliates only and not contractors generally; to alleged discriminatory practices as to only one man, Lewis, and not employees generally or prospective employees generally.

The General Counsel at the hearing limited himself generally to the issues, and the Trial Examiner

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with labor organizations which (2) were obligated to give preference to their members in dispatching applicants for employment, and (3) did give such preference to their members, have been and are fostering and establishing hiring practices among the employer members of the Chapters which have discriminated with respect to the hire of Lewis and other non-union workmen, to encourage membership in a labor organization in violation of Section 8 (a) (3) of the Act, and thereby have been and are interfering with, restraining and coercing employees and applicants for employment in the exercise of their right as guaranteed in Section 7 in violation of Section 8 (a) (1) of the Act."

likewise limited himself in his findings to the issues. The Board's Opinion, however, must be scrutinized to keep it within the issues.

3. *Hearings, Intermediate Report and Exceptions.*

Hearings were conducted on Oct. 26-27, 1957 at which time all allegations of the complaint were put in issue by answers in general denial, except the existence of the parties was admitted (R. 8). Exceptions were filed by the General Counsel but not by any of the respondents. The only finding and recommendation unfavorable to any of the respondents was the finding that Local 242 had violated the Act by inducing Lewis to drop the charges.

4. *Decision and Order, Dissenting Opinion, and (majority) Opinion.*

On December 14, 1957, the Board rendered its majority Decision and Order (R. 44; 119 NLRB No. 126) and on the same day member Murdock rendered his separate opinion (R. 55) concurring in part and dissenting in part (R. 63). We believe that Murdock misunderstood the findings in the case. An abstract of his opinion and an analysis thereof appears in Appendix No. 4 and 5.

5. *Petition for Enforcement and Petition for Review.*

The General Counsel filed his petition for enforcement in this court and respondents have filed separate petitions for review.

B. Position of the Parties and Counsel.

To simplify the problem of adjudication, we have removed from our argument disputes over the evidence. We accept the Trial Examiner's findings of fact. We accept the Trial Examiner's recitals of the

evidence where the Trial Examiner has made them the basis of findings of fact. We vigorously oppose any attempt to convert these recitals into non-administrative findings of fact. Our disagreement that some of these findings are not supported by substantial evidence is indicated by the asterisk. These exceptions are argued in "V. Erroneous Findings Not Supported by Substantial Evidence."

A different problem is presented by the Board's findings of fact. The Board has misapplied its own findings in its implementation holding. We are in serious disagreement with the General Counsel over what are recitals of evidence in the Board's Opinion and what are the findings of the Board. Mentally, we can accept the Board's findings, but on the record, because of a fear of misunderstanding we cannot accept them.

1. ***Positions on Issue of per se Illegality of the Contract.***

The Trial Examiner held that the contract was not illegal *per se* as a matter of law. The Board held that it was illegal as a matter of law. The General Counsel does not present this issue to the court. The General Counsel has commingled *per se* considerations with "reasonable man", and non-administrative findings of implementation and unfair labor practices.

2. ***Positions on Issue of Implementation of the Contract.***

The Trial Examiner found that there were no requisitions for hodcarriers in the period prior to May 17 (which is the terminal date of our inquiry) by contractors affiliated with the AGC-Chapters. He recited that there were requisitions by other employers, *, but since the issues are limited to affiliates of the Chapters, he found that the contract was

not implemented. (R. 33-34, 35). The Board did not find implementation (SR. 197, 207), but nevertheless misunderstood its footnote No. 3, and held that there was "implementation of the unlawful contract in the continuous rejections of Lewis' applications" for work. Not having found any discriminatory conduct under the issues, this is in effect a holding that any implementation of an unlawful contract is illegal. For this, they have allowed back pay to Lewis.

The General Counsel presents both grounds, namely that there were requisitions by AGC-affiliates, assumes that Lewis would be qualified to perform the jobs, and argues that Lewis implemented the unlawful contract; and secondly, that the implementation of the contract was by unlawful means, that is, discriminatory practices. As to the first, he has also misunderstood the findings of the Trial Examiner and the Board that there was no implementation of the contract. As to the second, he makes non-administrative findings.

The Trial Examiner found no illegal implementation because the contract was not illegal and any implementation in a legal manner would be lawful; and secondly, since there were no requisitions, it could not be implemented in any event.

The Board found an illegal implementation because the contract was illegal, and misunderstood its own findings by assuming that there were requisitions from the AGC-affiliates and assuming that Lewis was qualified to be dispatched. The General Counsel made the same mistake, and further found illegal implementation based on his non-administrative finding that Lewis was discriminated against for non-membership in the union.

3. *Positions as to Lewis.*

The Trial Examiner taking *per se* views of the "clause, implementation and Lewis", found no back pay in order, and for the further reason that the contract could not possibly be implemented to Lewis' prejudice because there were no requisitions.

The Board took *per se* views of the "clause, implementation and Lewis", and ordered back pay, on the mistaken holding that there were job requisitions from AGC-affiliates and the Board assumed that Lewis was qualified to be dispatched.

The General Counsel commingled "per se", with reasonable man, with the non-administrative finding that there were jobs available, and that Lewis was qualified. The General Counsel argued that back pay was in order for this reason, and because Lewis was discriminated against generally, although this was not alleged, nor was it the basis of findings by the Trial Examiner or the Board.

4. *Summary of Positions.*

(a) The Trial Examiner.

The clause it not illegal, therefore, implementation in a legal manner is not unlawful. There was no implementation under the issues because there were no requisitions by AGC-affiliates. There is evidence of requisitions by other employers *, but this is outside the issues. There is evidence of discriminatory practices by the union, but general discriminatory practices is outside the issues. These practices were not applied to the contract nor to the AGC-affiliates because there were no requisitions. Lewis is not entitled to back pay because he was not discriminated against under the issues.

(b) The Board.

The clause is illegal and therefore any implementation is illegal. The Board mistakes its findings and holds that there were requisitions from the AGC-Chapters, assumes that Lewis was qualified to be dispatched, and therefore finds implementation. The Board did not find that Lewis was denied a job, because of the discriminatory practice of the union to prefer members. The Board found the coerce-restrain violations derivitively.

(c) General Counsel.

The Trial Examiner and the Board considered the "clause, implementation and Lewis" in their *per se* aspects. The General Counsel argues that the court must consider how employees "reasonably feel" about traditional hiring halls and building construction hiring halls in particular, and consider the illegal practices of the union to discriminate in favor of its members. We thus get from the General Counsel a distorted view of the "clause, implementation and Lewis."

C. Summary of the Facts.

While there are few disputes as to what the evidence showed, there is dispute as to what the findings are and what effect should be given to the evidence and the findings by this court. Brevity at this time is a virtue.

The Seattle and Tacoma Chapters are separate corporations (R. 81, 92, 98) whose members are engaged in building construction in their respective areas. (R. 104). The Mountain Pacific Chapter's members are engaged in highway and heavy construction. In Seattle, the employees are separated into two unions on the same basis as the Chapters.

That is, the respondent Local 242 includes within its membership employees who are qualified to work for the members of the Seattle Chapter. The employees who are qualified to work for the members of the Mountain Pacific Chapter belong to a sister union of Local 242, namely Local 440 which is not a respondent herein. (R. 93, 99-100, 101, 242). The Chapters are not engaged in construction or commerce. (R. 82, 90, 91, 98, 100).

Lewis was a former member of Local 242 which has two classes of employees with different skills, different employers, different practices and who are not interchangeable. (R. 14-15). Lewis was a hodcarrier and he would never be employed by any member of the Mountain Pacific Chapter. (R. 74, 99). In fact, Lewis had never worked for any member of any of the Chapters, nor had he ever requested work from them. (R. 84, 91, 100).

During the period from March 15, 1956 to May 14, 1956 Lewis was repeatedly applying for work from Local 242, and was repeatedly told that there was no work. During this period, the Trial Examiner found that no member of any of the Chapters had any job opportunities and had not requisitioned any help through the hiring hall. (R. 31-32). The Trial Examiner made recitals of evidence, however, that during this same period other employers, not affiliated with the AGC-Chapters, not covered by the hiring hall clause, not engaged in commerce, and not within the issue had requisitioned help, (R. 16, 33), and that Lewis was not given a job or jobs during that period because of a practice of the union to favor members over non-members. The Trial Examiner made further recitals that on May 9, 1956 at the Nielsen housewrecking job at the Teamsters Union Hall (R. 138, SR. 216) that Buchanan, union

agent, had threatened Nielsen with a picket line if he employed non-union help, but that Lewis nevertheless performed all of the work that was available. (R. 17-18). As to the Todd Shipyard job, the Trial Examiner said that he discredited[3] Allman's testimony * that this job required a man of much smaller dimensions than Lewis, (R. 31, No. 14) but did not recite that Lewis was discriminated against. From these recitals, the Trial Examiner states (R. 33) that they will not support a finding that any members of the AGC-Chapters, or that any other employer, discriminated against Lewis as the complaint alleges. The Board repeats these recitals (except the Todd job) but nevertheless states "it is unnecessary to determine whether there is sufficient evidence . . . . to support the allegation of discriminatory practices in hiring." (S. R. 197). Footnote No. 3 ,which will become famous in this case, does not reverse the Trial Examiner because it "concludes" that employers, other than AGC members, requisitioned employees. Because of ambiguity, because of the mis-interpretation given by the General

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[3] While the Trial Examiner devoted a full page (R. 19) and a half-page footnote (R. 32 #14) to the Todd episode, and states that he discredited the testimony of Allman, he does not conclude that Lewis was discriminated against (R. 33). Further he states that he must disregard this episode (R. 31 and footnote #13). However, the Trial Examiner probably relies upon the Todd requisition as evidence that calls were being made for men. This pertinency is trivial because the crucial period of rejection of Lewis' applications ends on the preceding day since Lewis was in fact dispatched on May 17th. In fact, the crucial period ends on May 14 because on that date commenced the facts of inducing Lewis to drop the charges. From the events since May 14th, the Trial Examiner, the Board, and for that matter the General Counsel, have not found nor argued that these also show a general discriminatory policy toward Lewis. The Board never mentioned the Todd episode probably for the reason that they could not give it any effect. We believe that the attempt of the General Counsel must fail for the same reason.

Counsel to this statement, and because it does not meet the standards of this Court for explicitness, as well as not supported by substantial evidence, we have taken exception.

The Labor Agreement was executed by the AGC-Chapters and the District Council, and not by Local 242 as erroneously found by the Board and as urged by the General Counsel. None of the Chapters ever deal with any of the Unions. The only dealings the Chapters have with the District Council is in the negotiation and execution of the agreement, and in the second stage of the grievance procedure. Grievances are first handled by the local union and the contractor. If they can't settle it, it goes to the District Council and the Chapter. The Local Unions do not participate in negotiations of the contract. Jobs are requisitioned by contractors directly to the local union. The Chapters and the District Council have nothing to do with the enforcement, administration or implementation of the hiring hall provisions. (R. 79, 92, 96, 97, 99).

When Lewis appeared at the hall for a job on May 14, 1956, the Union had just received a copy of the charges filed by him a few days prior thereto, and they ordered him out of the hall. Lewis returned on May 17, 1956. This was the first time, according to the testimony of Lewis when there were any jobs at the hall. Lewis was not first dispatched, but after a call was made by a representative of the Board, Lewis was dispatched that day. From that day on, Lewis was given work regularly and there is no complaint of discrimination. However, from that date on the Trial Examiner and the Board have found that Lewis was induced to drop the charges. These findings are supported by substantial evidence and we are precluded from urging any ob-

jection for lack of exceptions. The Trial Examiner and the Board have made no findings that any of the transactions occurring subsequent to May 17, 1956 (and possibly subsequent to May 14, 1956) are any evidence of a discriminatory policy. We do not understand the General Counsel to urge otherwise. (R. 15, 125-6, 215).

D. Summary of the Intermediate Report.

A convenient abstract of the Trial Examiner's Report is set out in Appendix No. 2, p. 3A. A reading of these appendices is not necessary to a full understanding of this brief.

E. Summary of the Board's Decision and Order, and Opinion.

Set out in Appendix No. 3, page 7A.

F. Summary of Murdock's Opinion.

Set out in Appendix No. 4, page 13A.

G. Rationale of Murdock's Opinion.

Set out in Appendix No. 5, page 17A.

H. Footnote No. 3, S. R. p. 197.

The Board's footnote No. 3 is set-out verbatim:

"The Union admitted that in doing the hiring for the employers it always hires its members in preference to non-members, and that whenever a member it not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-union member to any assignment. If the contract were not unlawful on its face, we would deem the record as a whole ample to support a factual inference that the Employers in fact hired hod carriers and common laborers through this union hall

and that the Respondents in fact hired such employees on behalf of the contractors in the closed-shop manner which the Union admitted."

(a) *Preferential Hiring Practices.*

The first sentence is practically a verbatim quote from the Trial Examiner's recitals:

"I have no doubt that Allman repeatedly applied this policy (to prefer union members over non-union men) to Lewis prior to the latter's dispatch on May 17, and referred union members to jobs in preference to Lewis because the latter was not a member of Local 242." (R. 33-34);

"Local 242 has had occasion to dispatch hod carriers who are not members of the organization, but the practice has been to do so only on occasions when no members are available for dispatch." (R. 15).

The Trial Examiner made other recitals of discriminatory conduct during the period in question (R. 16-18; 31-33), all of which the Board was mindful of because they repeated the same recitals (except the Todd Shipyard episode) "As the Intermedicate sets forth . . ." (S. R. 206-207). The Board has not stated anywhere that they disagree with the Trial Examiner that "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC-Chapters (or, for that matter, any other employer) discriminated 'with respect to the hire of Lewis,' as the complaint alleges and that Local 242 caused such discrimination, within the meaning of the Act." (R. 33).

The Board states that it is unnecessary for its decision to "determine whether there is sufficient evidence apart from the contract to support the alle-

gation of discriminatory practices in hiring." (S. R. 197). The Board further states that if the record showed requisitions from the AGC-affiliates on the dates that Lewis applied for jobs, such evidence would be immaterial (S. R. 207):

> "It is equally immaterial that there is no evidence now before us that on the particular days when he was rejected there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract."

(b) ***Contractors Other Than the AGC-affiliates Hired Employees and the Union Applied its Discriminatory practices as to Them.*** *

The second sentence of the footnote refers to a situation involving significant implications. The whole Brief of the General Counsel is premised upon it. The General Counsel repeated, as did the Trial Examiner and the Board, the recitals of discriminatory conduct by Local 242. Neither the Trial Examiner (R. 33) nor the Board (S. R. 197) could use these recitals to form findings of discriminatory conduct.[4] However, the General Counsel used them as the basis for his non-administrative finding of discriminatory conduct under the issues, under the contract, as to the AGC-affiliates. The General Counsel states "Finally, preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 36): "These circumstances amply support the conclusion that the discriminatory treatment of Lewis was attributable to his non-membership in

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[4] The Board stated (footnote No. 7, SR. 201):

> "It is not necessary, as the Respondents apparently contend, that any discrimination provided for in the contract must be shown in fact to have occurred before the agreement itself be declared unlawful."

Local 242." The General Counsel asserts (GC-Br. 5):

> ". . . respondent Chapter (affiliates) had frequent occasion to use the services of Local 242's hiring hall in this manner during the events in this case" and such affiliates did "submit requests for employee' to such hiring hall."

The basis of this quote is the footnote No. 3. The General Counsel has overlooked the specific finding of the Trial Examiner to the contrary (R. 33-34).

This footnote cannot refer to the AGC-contractors without being inconsistent with the Board's statement (S. R. 207):

> "It is equally immaterial that *there is no evidence* now before us that on the particular days when he was rejected *there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract.*" (emphasis added).

Further, it is clear that the reference to employers in the footnote refers to employers other than the AGC-affiliates. In the Opinion there were eight references to the AGC-contractors. They were specifically described as "AGC contracting companies (SR 198), as the "employers here" (SR 200), as "Employer Respondents" (SR 206), and as Respondent Employers" (SR 205; three times on p. 207, and p. 208).

In any event, if the Board was reversing the Trial Examiner it was incumbent on it, under the authority of *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456, to name the witnesses it believed, and recite the testimony it relied upon, otherwise in the event of conflict the Trial Examiner's findings would prevail over the Board's

for the Supreme Court therein stated (p. 490) in effect that the Trial Examiner's findings is part of the record under the Taft-Hartley Act which provides in Sec. 10 (e) that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Likewise under the Administrative Procedure Act. 5 U. S. C. A. Sec. 1007 (b) which provides: "All decisions (including initial, recommended or tentative) shall become a part of the record . . . . "

The Court reviewed the legislative history and concluded that "enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."

The court concluded that evidence supporting a conclusion of the trial examiner is more substantial, than when it doesn't, stating at p. 496:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

This court followed the rule of *Universal Camera* recently in *NLRB v. Englander Co.,* CA-9, October 10, 1958, 42 LRRM 2841, 260 Fed 2d 67.

In *Kelly v. Everglades Drainage District,* 319 U. S. 415, 87 L. Ed. 1485, the United States Supreme Court held at p. 420:

> "To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

In *Baltimore & Ohio Railroad Co. v. U. S.* CA-3, 1953, 201 F. 2d 795, the court likened the provision of the *Administrative Procedure Act* (5 U. S. C. A. 1007) to the *Federal Rules of Civil Procedure* (29 U. S. C. A. Rule 52 (a)) which provide:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon"

and stated at p. 800:

> ". . . if we are to do what we are required to do in the way of reviewing the action of an administrative agency, we must have some help in learning from that agency what is interesting discussion of the testimony of witnesses in a given case and what the agency concludes from that testimony. This report fails to give it and, therefore will have to be sent back to the Board for appropriate findings of fact."

Here it would be futile to send the case back to the Board for appropriate findings because the Trial Examiner said there was no evidence on which to make credible findings (R. 33-34).

United States v. Forness, (CA-2, 1942) 125 F. 2d 928 held that explicit findings of fact not only enable the appellate courts to more conveniently review decisions of trial courts but they also serve the important purpose of evoking care on the part of the trial judges in ascertaining the facts. Also see Barron & Holtzoff, *Federal Practice and Procedure,* Section 1121, and cases cited therein.

In *Irish v. United States,* (CA-9, 1955) 225 F. 2d 3, this court had a case arising under the Federal Tort Claims Act, in which the trial court had failed to make specific findings on the issue of negligence. The findings did not reveal which witnesses the trial

court believed or which facts were accepted as true. This court remanded the case to the trial court for entry of appropriate findings holding:

> "Findings of fact are required under Rule 52 (a) *Federal Rules of Civil Procedure,* 29 U. S. C. A. The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision (citing cases)."
>
> "The findings in this case provide no such understanding and give no hint as to the factual basis for the ultimate conclusion."

Since the position of the General Counsel is (GC-Br. 5) that the footnote finding reverses the Trial Examiner (R. 33-34), it is too general for such purposes.

Further, the Board would have to rely upon substantial evidence showing that the AGC-affiliates were requisitioning from the pool at the crucial times. In *Consolidated Edison Co. v. NLRB,* 1938, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206, the United States Supreme Court said at p. 229:

> ". . . substantial evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

In *NLRB v. Thompson Products,* CA-6, 1938, 97 F. 2d 13, at page 15, the court added:

> Substantial evidence ". . . means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and considering them in their

> entirety and relation to each other, arrives at a fixed conviction."
>
> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

In *Ballston-Stillwater Knitting Co. v. NLRB,* CA-2, 1938, 98 F 2d 758 at p. 760 the court stated after quoting Sec. 10 (e) of the Taft-Hartley Act, that it is not

> "bound to accept findings based on evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted."

The Agency must not only find the ultimate facts according to *Public Utilities Commission v. F. P. C.* (CA-3, 1953), 205 F. 2d 116, 119, but also

> "It is also settled that an administrative order must contain express findings of the basic facts upon which the expressed, ultimate fact must be supported. *United States v. Caroline Freight Carriers Corp.,* 1942, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States v. Chicago, M. etc. RR.,* 1935, 294 U. S. 499, 511, 55 St. Ct. 462, 467, 79 L. Ed. 1023."

We therefore conclude that if the footnote gives any support to the General Counsel (GC-Br. 5), it must be on the basis that it reverses the Trial Examiner. As a reversal it must fail, so the General Counsel is left without support.

II.

SPECIFICATION OF ERRORS
and
STATEMENT OF THE ISSUES

A. The Trial Examiner and the Board Erred in Holding and Finding, to-wit:

1. ***The Board in holding that the hiring hall clause was per se illegal as a matter of law.***
(R. 45, SR. 197);

2. ***The Board in holding that ANY implementation of the hiring hall clause was illegal as a matter of law.***
(R. 46; SR. 205-206);

3. ***The Board in holding that there was implementation of the hiring hall clause by the "continuous rejections of Lewis' applications for work" as a matter of fact.***
(R. 46-47; SR. 205-206; also see SR. 207, where Board states that the contract was not implemented);

4. ***The Board in holding that Lewis should be allowed back wages.***
(R. 46-47, 48; SR. 208);

5. ***The Board in prescribing criteria to be included in the labor agreement and for posting.***
(SR. 202-203);

6. ***The finding by the Board that Local 242 violated the Act by "executing" the Agreement.***
(R. 45 and footnote No. 1; SR. 205 and footnote No. 11);

7. ***(If SR. 197, foonote No. 3 can so be interpreted:) The finding by the Board that AGC-affiliates requi-***

sitioned help; that Local 242 had a disctriminatory policy of favoring members; and applied that policy to the said requisitions.

8. *(If their recitals of such evidence constitutes findings of fact within the issues:) The Findings by the Trial Examiner and the Board that Local 242 had a discriminatory policy of favoring members; that employers (not affiliated with the AGC) requisitioned help; and that Local 242 applied that policy to said requisitions.*

B. The Issues Presented by the Board's Petition for Enforcement:

1. *Is the Hiring Hall Clause per se Illegal?* (R. 45, SR. 197);

2. *Will Any Implementation*[5] *of a per se Illegal Hiring Hall Clause Be Illegal?*

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[5]We have used, and we believe that the Trial Examiner and the Board have used the terms "implementation, enforcement and administration" synonymously. This is to be distinguished from the terms "execution and maintenance," with the latter term referring to publication of the agreement to employees and prospective employees. These terms have been used thus in the leading cases of:

Monolith Portland Cement Company, 1951, 94 NLRB 1358, 1363;

Port Chester Electrical Construction Corp., 1951, 97 NLRB 354, 355;

County Electric Co., Inc., 1956, 116 NLRB 1080, 1081.

On the other hand, the General Counsel has intermingled the terms with confusion. For instance, the General Counsel undoubtedly uses the word "maintenance" to mean "implementation, enforcement and administration" in the following statement (GS-Br. 12):

> "Finally, *preference for union members was in fact practiced* in Local 242's hiring hall. From all of these circumstances, encouragement of union membership, at least in the sense of encouraging adherence to union rules and support of union activities could reasonably be inferred from the *maintenance* by respondents of their hiring agreement." (Emphasis added.)

While the Board and the General Counsel have avoided

(R. 46, SR. 205-206; see SR. 207, where Board states contract was not implemented). In other words, will *any* rejection of any applicant for work, even for reasons otherwise legal, be nevertheless unlawful when done pursuant to a *per se* unlawful hiring hall clause?

3. (a) ***Should Lewis Be Allowed Back Wages Under the Issues?***

   (b) ***Assuming that there was a requisition from an AGC-contractor under the hiring hall clause, and that Local 242 rejected Lewis' application not pursuant to any discriminatory practice of the union to prefer union members, should back pay be given Lewis?***

4. ***Should the District Council be liable for back pay to Lewis under 3 (a), and under 3 (b)?***

5. ***Should the AGC-Chapters be liable for back pay to Lewis under 3 (a), and under 3 (b)?***

III.

SUMMARY OF RESPONDENTS' ANSWER TO ISSUES PRESENTED BY GENERAL COUNSEL

The General Counsel set up his brief with separate discussions of the discrimination violations and the coerce-restrain violations, first as a preliminary Summary of Argument (GC-Br. 11), then in full-dress Argument (GC-Br. 17 and 31). He thus had four opportunities to present the Board's *per se* views of the hiring hall clause, and similar

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the use of the term **per se**, we believe the term is fairly descriptive of the Board's position. The **Trial Examiner** used the term four times to describe the General Counsel's position and Murdock used it twice. This court used the term in the **Swinerton** case and the Board has used the term often.

opportunities to present the Board's view that *any* implementation of the unlawful contract was illegal. Similarly with respect to Lewis' back pay. However, only once did he mention these issues, and that was in respect to the *per se* illegality of the hiring hall clause (GC-Br. 11-12) in his preliminary Summary of Argument. However, he colored it with the circumstances of how it would be considered by a reasonable man, then he abandoned both by posing the hiring hall clause with a non-administrative finding of fact "Finally, preference for union members was in fact practiced in Local's hiring hall.", and "from all these circumstances". (GC-Br. 12). Nowhere did he pose the Board's implementation views, nor the basis for back pay to Lewis.

The General Counsel is on three horns of a dilemma:

(1) The *per se* Aspects of the "clause, implementation and Lewis."

The *per se* unlawful clause, *any* implementation thereof in a manner not otherwise illegal, and the "continuous rejections of Lewis' applications" not pursuant to any discriminatory policy were the issues, and the only issues posed by the Board and the Trial Examiner.

Up to this time, all board decisions and court decisions treated *prima facie* legal exclusive hiring hall clauses, not as *per se* illegal, but as legal unless the practice or implementation was illegal because of discrimination. That this has been the Congressional intent has never been questioned, and is in fact conceded in this case by the Board (S. R. 201-202, footnotes No. 8 and No. 9; Murdock's separate

Opinion, R. 59, 60) and by the General Counsel (GC-Br. 12, 15, 21)[6].

Starting with the premise that exclusive hiring hall clauses, which contain no phrases proscribed by statute, are legal, the General Counsel was confronted with the insurmountable hurdle of arguing that you can draw therefrom unlawful inferences. It is easy to understand why the General Counsel did not present the Board's views of the contract. The General Counsel had two additional choices, which we now explore.

(2) The Per se "clause, implementation and Lewis" As Viewed by a Reasonable Man.

The General Counsel in analyzing the coerce-restrain and the discrimination violations posed these subjects thus:

> "Such unlawful restraint is established in this case by the showing that job applicants could *reasonably feel* that employment opportunities depended on their good standing with Local 242." (GC-Br. 13);
>
> "All that is required to sustain the Board's Sec. 8 (a) (1) and (b) (1) (A) findings is that the hiring agreement in this case had the effect of restraining employees in their right to 'refrain' from assisting unions or engaging in union activities." (GC-Br. 32);
>
> "The short of the matter is . . . that applicants could *reasonably feel* that their employment de-

[6] Thus, the General Counsel states:

"The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful (p. 12);

"Hiring halls can perform their useful and permissible function of providing an efficient and fair method for the recruitment of personnel without having a discriminatory or coercive effect on the employees who must utilize such halls in order to find employment." (P. 15.)

> pended on their good standing with Local 242." (p. 33);
>
> "Moreover, as employees well know, hiring halls traditionally have been operated primarily for the benefit of union members, and . . . employees may be expected to *assume* that such an arrangement is intended to operate in that fashion." (p. 12);
>
> "From all of these circumstances, encouragement of union membership . . . could reasonably be inferred from the maintenance by respondents of their hiring agreement." (p. 12); (emphasis added)

in the framework of the reasonable man. However, before he left this premise at the door of this court, he abandoned it every time by injecting the non-administrative findings of discriminatory practices by Local 242 applied to Lewis under the issues of this case. This opportunity was lost as a dilemma. It is well for us to analyze the difficulties with this position.

Up to now an exclusive hiring hall clause was not held illegal by the Board unless it contained phraseology proscribed by the Act. And, an exclusive hiring hall practice was not illegal unless there was conduct violative of the Act, consisting of actually removing an employee from the job or denying a prospective employee a job. All exclusive hiring hall clauses and practices were viewed illegal only under the discrimination provisions Sec. 8 (a) (3) and 8 (b) (2), and derivitively, but not independently, violative of the coerce-restrain provisions, Sec. 8 (a) (1) and 8 (b) (1) (A). We repeat the essential legal components, a proscribed clause or a proscribed practice, from which the inference could then be made of unlawful "encouragement to membership" or "discouragement," for a discrimination

violation. The General Counsel, could not start off with the assumption that the clause was illegal on its face because that would be arguing in a circle. He was likewise embarrassed with the prospect of the premise of actual discrimination of an employee by removing him from the job or preventing him from getting the job, since there was no finding of any job requisitions from the AGC-affiliates (under the issues, only the AGC-affiliates are involved). We shall see in the next sub-title that he made a non-administrative finding on this. Under all court decisions, and all prior board decisions, you had to start from either proscribed clauses or proscribed practices, before you could draw illegal inferences of discrimination.[7] Therefore, in this vacuum he set his reasonable man, but could find nothing for him to sit-on, so he abandoned him for the more fruitable prospect of framing the issues based on non-administrative findings.

(3) The "Contract, Implementation and Lewis" Supported by a Non-Administrative finding of actual discriminatory practices.

The Congressional intent was, and all Board holdings and all Court decisions up to now have posed

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[7]This court in NLRB v. Reed (CA-9), 206 F. 2d 184, relied upon NLRB v. Teamsters Union, 196 F. 2d 1 (AA-8) in holding that not only must discrimination be proved, but "encouragement to membership" must be proved as an independent fact. In that case Charlton was an old-time member of the union who had been pulled off of the job while in good standing because he didn't have a permit, and this court held that he was not "encouraged to membership" because he would not be influenced subjectively. The *Teamsters* case was one of three cases consolidated *sub nom* Radio Officers Union v. NLRB, 347 U. S. 17, in which the United States Supreme Court held that where the discrimination is proved you infer "encouragement" or "discouragement." We thus view the *Reed* case in the light of *Radio Officers*. This specific problem is not involved here.

the legality of exclusive hiring halls as a question of fact. This is certainly the best of the three theoretical choices available to the General Counsel and this is the basis on which he posed the "contract, implementation and Lewis" when he reached his concluding statement.

This was no less, however, a dilemma to the General Counsel because the Board had not given him any findings of fact to which he could anchor his argument. The General Counsel then made non-administrative findings of fact:

(1) "... 242 maintains ... a hiring hall to which the employer members of the respondent chapters submit requests for employees when job openings occur ... The Employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242's hiring hall in this manner during the events of this case." (GC-Br. 5);

(2) that the union enforced the contract in a discriminatory manner when he stated "Finally, preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 12);

"Under these provisions, neither discrimination in hiring nor encouragement of union membership need be shown; it is enough, that enforcement of the agreement has the effect of restraining employees in their right to refrain from union activities." (GC-Br. 13);

"Finally, it should not be overlooked that, notwithstanding the noncommittal language of the contract between respondents, Local 242 in fact followed the practice of favoring union members in making job referrals (supra, p. 6)." (GC-Br. 27 and the footnote No. 20);

"Such a practice is clearly violative of the Act, irrespective of the presence of nondiscriminatory contract language. . . . In view of its more comprehensive holding respecting the hiring agreement in this case, however, the Board did not base its unfair labor practice findings or its remedial order on the discriminatory practices generally, apart from its finding and order respecting Lewis (R. 45-51, S. R. 197)."

(3) "Wholly apart from the hiring agreement, moreover, the evidence shows that the reason Lewis was not referred to jobs was that he had been dropped from membership in Local 242, a reason specifically made an improper basis for discrimination by the statutory provisions . . . Finally, openly disclosing that Lewis' lack of membership made him unacceptable to Local 242 and ineligible for referral, Local 242's business agent threatened to picket a contractor with whom Lewis obtained employment because the contractor, by hiring Lewis, had not kept 'straight union men on the job'." (GC-Br. 35-36).[8]

Having thus fortified himself with tailor-made issues and concocted findings of fact, the General Council then addressed himself to the problems of the law. We have difficulty in reconciling the holdings of the cases the General Counsel cites with the

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[8]This is the second presentation of the Lewis rejections—as based on a discriminatory practice, which was not within the issues. The first presentation was also on the basis of a discriminatory practice of denying him his rank under a "job rotation plan" (CC-Br. 35), likewise not within the issues. Lewis was not presented as "implementation" of the unlawful contract in the manner in which the Board found the violation to have occurred (R. 46; S. R. 205-206), probably for the reason that the General Counsel realized that the Board had misinterpreted its finding (footnote #3, SR. 197) and thus had no finding on which to base the violation.

principles he says they stand for. Further, we watch with interest his efforts to get this court to abandon its holding in *NLRB v. Swinerton,* CA-9, 202 F. 2d 511, certiorari denied 346 U. S. 814.[9]

IV.

ANSWER TO "BRIEF OF THE NATIONAL LABOR RELATIONS BOARD"

A. Answer to "Statement Of The Case".

We accept the General Counsel's statement of what the Board held. However, the Board made no findings of fact of discriminatory practices by Local 242 in the "continuous rejection of Lewis' applications for jobs." (GC-Br. 2-3).

B. Answer to "I. The Board's Findings of Fact."

(GC-Br. 3).

We would modify the General Counsel's statements in these respects. The AGC-Chapters bargain and execute agreements only with the District Council, and not with the Local Unions. Local 242 never negotiates with nor handles grievances with any Chapter. The Mountain Pacific Chapter's affiliates do not hire persons of the same skills, nor to perform the same type of work as performed by members of Local 242. Local 242 dispatches men from the hiring hall, upon requisitions from affiliates of the Seattle Chapter, and occasionally when a Tacoma Chapter affiliate has a job in the Seattle area, but never to affiliates of Mountain Pacific Chapter.

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[9] In addressing itself to this task undoubtedly this court will be mindful of its considered opinions in the later cases by this court of NLRB v. Thomas Rigging Co., CA-9, 211 F. 2d 153, certiorari denied, 348 U. S. 871 and NLRB v. ILWU Local 10, F. 2d 778, 781; as well as cases of the other Courts of Appeal following this rule.

The District Council has nothing to do with dispatching, and has no dealings with the contractors.

The Board did not, nor did the Trial Examiner make any finding as stated by the General Counsel (GC-Br. 5) that the affiliates requisitioned from the Local 242 hiring hall. The recitals by the General Counsel of a practice by Local 242 to prefer members, of Lewis' continuous applications for work from March 15, 1956 until May 14, 1956 and of the rejections, including the Nielsen episode and the Todd Shipyard episode, are not the basis of any findings of fact by either the Trial Examiner or the Board that the alleged discriminatory policy of the union was applied to the AGC-affiliates under the issue of the case. The Complaint did not allege that Lewis was discriminated against generally, but only under the hiring hall agreement with the AGC, and consequently Lewis could not be a vehicle for the implementation of this hiring hall agreement unless the AGC-affiliates had requisitioned help.

Commencing with May 14, 1956, we do not question that the findings show that Local 242 induced Lewis to drop the charges and that such findings are supported by substantial evidence. However, the Trial Examiner and the Board did not make any findings that this conduct was also evidence of a general discriminatory policy of the Union as to Lewis, and the General Counsel nowhere so contends.

C. Answer to "II. The Board's Conclusions and Order".

The Board found the AGC-Chapters had violated Section 8 (a) (3) as to which the Complaint did not allege or claim a violation. (R. 23, footnote No. 9; this brief p. 2 and footnote No. 2).

We do not think that the Board posed the exclusive hiring hall clause in a setting of the "circumstances of this case", but posed it solely *per se* as a conclusive presumption which does not require proof and which precludes proof (S. R. 197).

It is true that "In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs." but these were jobs of other employers, not covered by the hiring hall agreement, not affiliates of the AGC-Chapters and not within the issues of this case (see supra 15). (GC-Br. 10). We should point out in this connection that the Board found the "implementation of the unlawful contract in the rejection of Lewis' continuous applications for employment was unfair labor practice" (R. 46; SR. 205-206) by a mis-interpretation of its own finding (footnote No. 3; see this brief pp. 5-6, 15, 18, 71-74). This holding is on the basis that *any* implementation was illegal. Member Murdock likewise mis-interpreted the facts. (See Appendix No. 5, pp. 17A-20-A).

D. Answer to "Summary of Argument".

(GC-Br. 11)

This is the only place in the General Counsel's brief where he poses a *per se* issue, which he colors with a "reasonable man's" assumptions, then abandons them with a non-administrative discriminatory practice, and concludes that "from all these circumstances" encouragement "could reasonably be inferred from the maintenance . . . of the hiring agreement."[10]

He contends that the coerce-restrain violation was found independently by the Board which is in-

[10]By maintenance, he means "enforcement, implementation and administration."

correct. However, this suggests a fatal defect in the Board's holding that the AGC-Chapters violated the coerce-restrain provisions. Although the Board found the Chapters had violated the discrimination provisions, this must fall because they were not so charged in the complaint. Therefore, the derivitive finding must fall.

As to the discrimination against Lewis, the General Counsel correctly states in "(1)" that the Board's conclusion is based on "the fact (*sic*) that Lewis was denied job referrals pursuant to an unlawful agreement", but in this statement the General Counsel falls into the same error as the Board and member Murdock, because this is a conclusion based on a mis-interpretation of footnote No. 3, SR 197 (S. R. 207). The General Counsel's "(2)" falls because there are no findings on which to base it, and if such findings were made they would be outside the issues of the Complaint.

E. Answer to General Counsel's "Argument".

(GC-Br. 14)

The Congressional mode was to make the exclusive hiring hall agreement, which contained no proscribed language, a question of fact, clothing the Board with ample authority to punish the wicked. The Board's mode is to convict the unions and the employers alike when they embark upon negotiation of an exclusive hiring hall agreement, and make them prove their innocence at the time the agreement is executed by inserting so-called safeguards. This is not the English-law principle of judging only those accused of violation. It is the civil law procedure of not distinguishing the innocent from the guilty, and throwing the burden on the defendant to prove his innocence.

Where the Act has proscribed the wrong, namely, proscribed clauses or practices, then as to the remedy, the Board has wide latitude to "use . . . its judgment and its knowledge", but none of the cases give the Board the substantive law legislative power to "distinguish the licit from the illicit factors that inhere in union-operated hiring arrangements". For instance, the cited cases (GC-Br. 16) do not sustain the General Counsel. *NLRB v. Seven-Up Bottling Co.,* 344 U. S. 344, 348, 97 L. ed. 377, 73 S. Ct. 287 (1953) only involved the question whether the Board could apply its new policy of computing credits to back pay awards on a quarterly basis. At page 346, the Court stated: "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." In *Chicago, etc. Ry. Co. v. Babcock,* 204 U. S. 585, 598, 51 L. Ed. 636, 203-206 S. Ct. 595, a state board of equalization had valued the railroad property, and the court said that since there was no evidence of fraud or the use of wrong principles, it would not disturb its findings. Neither case was apposite.

F. Answer to "A. The hiring hall agreement (is) within the proscription of" the discrimination provisions of the Act.

(GC-Br. 17).

The correct tests are (1) a proscribed contract or practice, and (2) from which the inference of "encouragement" or "discouragement" can be drawn. It is not "settled law that the execution and maintenance of an exclusive hiring agreement . . . is violative" of the discrimination provisions. The cases cited (GC-Br. 17-18) are not apposite. In this court's *NLRB v. Shuck,* 1956, CA-9, 243 F. 2d 519, 521, cer-

tiorari denied, 348 U. S. 917, the agreement specifically provided for union preference, and Kieburtz was actually removed from the job in implementation of the unlawful agreement. In *NLRB v. Daboll,* CA-9, 1954, 216 F. 2d 143, 145, this court considered a proscribed agreement to hire only union plasterers, and found that Sells and Sinclair, members of the union, were denied employment because they couldn't get clearance from the union. In *NLRB v. Sterling Furniture Co.* (CA-9, 1953), 202 F. 2d 41, 42, the proscribed agreement required union membership, and Barnes was removed from the job because his work permit was revoked by the union. Enforcement was to (p. 45) "cease giving effect to the contract.' In *Red Star Express Lines v. NLRB,* (CA-2) 196 F. 2d 78, 81, a forbidden clause required the hiring of union members and Mullen was discharged at the request of the union for supporting a rival union. In *NLRB v. Philadelphia Iron Works, Inc.* (CA-3, 1954), 211 F. 2d 937, 941, the agreement required the hiring of union members with a referral slip. Fink, a union member, secured a job and asked for a referral slip which was refused because he was not at the top of a rotation list. The union told the company not to hire him. Enforcement enjoined discrimination under the agreement (p. 943).

If the agreement is not violative of the Act on its face, then there is no violation in the absence of discriminatory practices.

The General Counsel errs in asserting that an exclusive hiring hall clause unlawfully "encourages union membership" and that there is no need to have a showing of discriminatory practices in order to have unlawful conduct. The cited cases are not apposite (GC-Br. 18). In *NLRB v. International Union of Boilermakers* (CA-3, 1955), 218 F. 2d 299,

302-303, there was a proscribed preferential clause pertaining to extra work which required employees in good standing with union books. Three persons were discriminated against because they did not have union books. In *NLRB v. McGraw & Co.,* (CA-6, 1953), 206 F. 2d. 635, 641, there was a proscribed closed shop agreement. There are cases where application for employment is a "futile gesture" and is not required in order to show a violation. These fall into two classes. Where the agreement is proscribed. Where a practice is established by independent evidence of discrimination, which comes to the attention of the prospective employees, they are not then required to make formal application. All of the General Counsel's cases fall into one or both of these classes. None of them support his assertion that with a non-proscribed exclusive hiring hall clause, there can be a violation of the Act without actual practices of discrimination. The reason is simple. Such a clause is not illegal. The cited cases are not apposite.

In *NLRB v. Waterfront Employers,* (CA-9, 1954), 211 F. 2d 946, 952, there was an admitted illegal hiring hall agreement. Two members of the union, Crum and Purnell were discriminated against because of the non-payment within 30 days of fines of $2400 imposed for not standing their share of picket duty. Purnell did not work during a 30-day grace period because of arthritis, but during this period on two separate occasions he asked the union dispatcher for a statement of availability for unemployment compensation benefits, and was twice refused with the statement that he only had 30 days to work unless he paid the fine. On the last occasion, he was told that "his time was up," and could no longer work unless the fine was paid. The dispatcher

testified that if Purnell had showed-up at the hall for work he would nevertheless have been permitted to work. At page 953, this court excused the application for work with this statement "The Board concluded, and we agree, that under these circumstances the futile gesture of applying for dispatch was not a prerequisite to a finding of discrimination."

This court had other evidence of the practice in the experience of Crum who worked during the 30-day grace period, up to the last few days when his gang was laid off. Crum phoned for a new dispatch and was told (p. 950): "Crum, there is no need of your calling up any more. There is a bug behind your name, and you won't be dispatched with your gang until the fine is paid." Crum contacted shipping companies who told him that he would be hired if he was dispatched by the hiring hall.

In this court's *NLRB v. Swinerton* (CA-9, 1953), 202 F. 2d 511, 515, certiorari denied, 346 U. S. 814, the written contract provided that there was "no limitation on the employer as to whom he shall employ," but the contract was misunderstood by the foremen who did the hiring. Swinerton's foreman told the machinists' agent and told the individual machinists applicants that Swinerton's contractual relations required that Swinerton "use only millwrights on the job", and Burns' foreman told them that "Burns' labor contract required them to hire millwrights with Millwright clearance" (p. 513). Work was imminent when these applications were made, and after the job commenced two more machinists applied at the Swinerton job inquiring for work for machinists, and the foreman responded with a "big wink", saying, "I'm wise to you guys." Only two of the six applicants visited the mill-

wrights' office inquiring for work permits and they were told that no permits were issued and that they would have to take an examination and pay $50 (p. 514). This court found the existence "of such discriminatory hiring policy is amply supported by evidence" and that "further application for employment would be futile, the job applicants need not go through the useless procedure of reapplying for employment at a later time when jobs are actually available in order to establish that they were victims of the discriminatory hiring policy." (p. 515). The jobs were imminent at the time of application.

In *NLRB v. Local* 420, *U. A.,* (CA-3, 1956), 239 F. 2d 327, the agreement provided that the firm would employ only members in good standing (p. 329). The hiring foreman was a member of the union who had been told at union meetings on many occasions that he could hire and retain only members in good standing (p. 330). A number of permittees had been granted weekly permits which were not renewed on the end of the week in question. On the following Monday, they went to the union to try to get permits. They had previously been told "Don't lose these permits because if you lose this permit, you are out of business . . . You cannot work without these . . . If you don't get permits, don't come back to work." (p. 330). The defense was that the employees should have reported to work on Monday instead of going to the union, where they were denied renewals. The Court stated, "Neither law nor common sense requires them to make a token appearance to preserve legal rights." (p. 331).

In *NLRB v. Lummus Co.* (CA-5, 1954), 210 F. 2d 377, although the company was not affiliated with the AGC, it followed the AGC closed-shop exclusive union hiring agreement. The Company told appli-

cants Reneau and Tucker on May 31 and June 1 that they had to get referrals from the Carpenters, take a test and pay $100. On June 5, the company hired three union carpenters. It was thus evident that the company required compliance with a union proscribed practice. It was not necessary for the men to apply at the union for referrals. As we have already pointed out, in *NLRB v. Shuck,* (CA-9, 1953), 243 F. 2d 519, 521, there was a proscribed clause and Kieburtz was discharged because of lack of membership. The foreman told him (p. 521): "We have to go along with the union on this, or they can make trouble for us."

Every case cited by the General Counsel established the principle that where the contract is proscribed, a discriminatory discharge or refusal to employ is violative of the discrimination provision. None of the cases held that an exclusive hiring hall clause was violative of the Act. (GC-Br. 19).

The General Counsel finds this court's considered holding in *NLRB v. Swinerton, supra,* inconsistent with his contentions and asks this court to modify its holding therein, in particular:

> (p. 514) "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against the nonmembers in the issuance of referrals'."

This court then pointed out that that was not the position of the Board, nor a correct statement of the law. The General Counsel (GC-Br. 20) then seeks to get in compliance with *Swinerton* by assuming the "burden of proof", not to prove any physical facts of a discriminatory practice, but only "the sum of the circumstances attending the adoption and maintenance of a particular hiring hall . . . " Note

that he discreetly mentions execution and maintenance, which is the publication of the clause, and he carefully avoids the obligation of bearing the burden of proof as to "enforcement, implementation and administration." The only burden he will assume is to tell us that a "reasonable man" would feel in some meager uncertain way "encouragement." When the General Counsel told us of this before he talked about "enforcement" (GC-Br. 13) and that here "preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 12). But he shows no inclination to assume the burden of showing these facts.

The General Counsel then abandons the whole basis of the Board's *per se* views of the "clause, implementation and Lewis" when he states (GC-Br. 21):

> "And, in counterpoint, nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance, no showing of unlawful encouragement can be made."

When the Board expressed its views on S. R. 197 and S. R. 207 as to the "clause, implementation and Lewis" it created a conclusive presumption that did not require proof and which precluded proof. In counterpart, the General Counsel states that proof of a legal practice will convert the "per se" illegal "clause, implementation and Lewis" into legality,

Radio Officers Union v. NLRB, 347 U. S. 17, cited GC-Br. 22, is not apposite. This is the first of three consolidated cases decided simultaneously. The closed shop agreement was signed prior to the effective date of the 1947 amendments to the Act and was thus legal. Fowler was a member of the union in good standing but had worked out of order, and the union required his discharge on the false pretext

that he was not in good standing. The court stated that if the legal closed shop agreement could be interpreted as a union preferential hiring clause, it would be preempted from the Act and would justify the discharge. The court held that the closed shop agreement was not a preferential hiring clause. In Radio Officers there was a discriminatory discharge in the absence of a hiring clause. Here we do not have any discriminatory conduct (under the findings and the issues) and an exclusive hiring clause patently legal. There is no similarity between the two cases.

Likewise the cited case of *NLRB v. Local* 542, *Operating Engineers,* (CA-3, 1958) 255 F. 2d 703, 42 LRRM 2181, is not apposite. The union had three classes of members "A", "B" and "C", with different wage scales and skills, and the union prevented three members from working outside of their "grades", and prevented a non-member from working. There was no agreement providing for these classifications, and the court held the conduct illegal stating (p. 2183): "This does not mean that the union may not administer referrals systematically in accordance with its rules or that a referral system is in its nature improper." Discrimination, not justified by a hiring clause, gives rise to the inference of unlawful "encouragement." Facts of discrimination are required before inferences can be drawn. Here there are no findings of discrimination under the issues; hence the General Counsel errs in drawing inferences.

The General Counsel again cites *NLRB v Waterfront Employers,* supra p. 35. (GC-Br. 25). In that case Crum and Purnell were actually discriminated against.

We now come to the footnote cases (GC-Br. 27).

Schuck and Swinerton have already been distinguished as involving proscribed agreements and proscribed practices, with actual discriminatory denial of employment. The first case cited is incorrectly named as "Operating Engineers." The correct title is *NLRB v. Local* 743, *United Brotherhood of Carpenters* (CA-9, 1953), 202 F. 2d 516. At p. 517 this court found that there was preferential agreement to use only carpenter members. In *NLRB v. Local* 420, *U. A.,* CA-3, 239 F 2d 327, we have already seen that the hiring foreman was a union member and required all employees to have union referrals. In all cases cited, there was a proscribed agreement and proscribed practices. In such cases, it is proper to infer "encouragement."

Again, footnote cases (GC-Br. 31) are distinguishable. In *NLRB v. Teamsters Union,* (CA-8, 1955) 225 F. 2d 343, the court stated p. 349:

> "In granting enforcement . . . we are allowing the union to be prohibited here from performing or giving effect in any way to the contract provision, not because of having made the contract provision but because of the abuse to which it has . . . put the provision . . . "

In *NLRB v. Dallas General Drivers Local* 745, 228 F. 2d 702, the court found an abusive use of the seniority clause and modified enforcement of the Board's order (p. 707):

> "We therefore approve the order to cease and desist from performing or giving affect to that portion of the contract which delegates to the respondent union authority to settle controversies relating to seniority. However, we cannot approve that portion of the order which seeks to prohibit the union from entering into or renewing any such agreement with any employer . . . "

By referring to the Board's case *sub nom* North East Texas Motor Lines, Inc., 109 NLRB 1147, at p. 1152, it is clear that the court did not strike down the agreement because the Court deleted from the Board's order, and notice, the following:

> "II. (a) Cease and desist from . . . .
>
> (2) Entering into or renewing any agreement with any employer which contains provisions delegating to the respondent authority to determine the seniority of employees or to settle controversies relating to seniority and enforcing such provisions . ."

G. Answer to "B. The hiring hall agreement is INDEPENDENTLY violative of" the coerce-restrain provisions.

(GC-Br. 31).

(1) *"Independent Violation" Issue Not Before This Court.*

The Board posed the coerce-restrain violation derivitively from the discrimination violation, and the Board made no independent findings of a coerce-restrain violation. The General Counsel has no authority to declare administrative policy, nor to ask the court to approve a non-administrative ruling. It was the intent of Congress that hiring clauses be handled as discriminatory violations on a question of fact. The Board has ventured on an uncharted sea on the discrimination issue, and showed no disposition to set a divergent course on a coerce-restrain issue. This court should dismiss this contention of the General Counsel summarily.

(2) *Theory Of The General Counsel.*

Without recognizing the right of the General Counsel to pose this point, we observe that he pre-

sents this argument on the basis of how a reasonable man would feel, thus:

> "Such unlawful restraint is established in this case by the showing that job applicants could *reasonably feel* that employment opportunities depended on their good standing with Local 242." (GC-Br. 13);
>
> "The short of the matter is . . . that applicants could *reasonably feel* that their employment depended on their good standing with Local 242." (GC-Br. 33). (Emphasis added).

It is to be noted that Sec. 8 (a) (1) contains the three words "interfere, coerce and restrain" while the Sec. 8 (b) (1) (A) provision omits "interfere." (See Appendix No. 1, page 1A). The legislative intent was that more should be required in the way of a factual showing as to union conduct, and that less need be shown as to employer conduct. Slight employer conduct could "interfere" with employees' Sec. 7 rights and thus they have more protection from employer conduct than they have from union conduct, because the union conduct must require more in the way of "coerce and restrain." Senator Taft likened it to "threat of force or threat of economic reprisal". The legislative intent was so construed in *Capital Service, Inc. v. NLRB,* (CA-9), 204 F. 2d 848, 347 U. S. 501. In that case one question was posed to this court, namely, whether the conduct of the union consisting of picketing and boycotting of the customers of a bakery firm restrained and coerced the employees of the bakery firm to join the union. The result of these sporadic activities was to cause curtailment of the production work of the bakery with consequent layoffs of the employees in question. The question of law was whether mere persuasion was violative, or whether the Act required more, such as a threat of economic reprisal. The

question was easily resolved by considering the legislative history (p. 853):

> "Senator Taft, in summing up the bill to the Senate on May 2, 1947 (stated):
>
> 'The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, Here are the rules of the game. You must cease and desist from *coercing and restraining* the employees who want to work from going to work and earning the money which they are entitled to earn. The Board may say, You can persuade *them* (that is, the employees, not the public); you can put up signs; you can conduct any form of propaganda you want to in order to persuade *them,* but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work. As I see it, that is the effect of the amendment. (Emphasis supplied by the court). Legislative History of the Labor Management Relations Act, 1947, vol. 2, p. 1206."

This court's footnote in that case is significant (p. 853 No. 4):

> 'The Senator apparently had changed his mind since a prior statement:
>
> 'Question: Suppose the union, instead of refusing to handle his goods in other plants which that union has organized, urges the general public not to buy products of non-union manufacturers?
>
> 'Answer: That is not forbidden by the Act, since it is merely persuasion.'
>
> "He had not then recognized that urging the public not to buy employee-made goods was not mere persuasion of employees but the threat of economic reprisal on the employees, by diminishing their employment through diminishing public buying."

This court then found facts of economic coercion (p. 853):

> "The evidence shows that all of the picketed stores did cease to sell the products manufactured by Service's employees. Here is more than an appeal to the *employees* to persuade *their* action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work." (emphasis by court).

In *Capital Service* there were physical acts committed which created economic compulsion akin to "coerce and restrain" of a nature that clearly interfered with Sec. 7 rights. It was a lot more than the *de minimus* flowing from a patently legal hiring clause. It was a lot more than what the "employees reasonably feel."

None of the General Counsel's cases are apposite —none are hiring hall cases (GC-Br. 33-34, and footnotes). In *NLRB v. Reed,* (CA-9, 1953), 206 F. 2d 184, the employer had no union agreement but fired Charlton on the threat of the union to strike the job. Charlton was a 50-year union member who went to work without a union clearance. This court held (p. 189) that Charlton had a right to continue working and that his discharge was discriminatory in violation of the Act. In *NLRB v. Local* 1423 *Carpenters Union,* CA-5, 238 F. 2d, the union adopted unilaterally a rotation rule and compelled the employer to accede to it by threat of a strike, and the union likewise threatened strike action if any of the employees violated the rule. The court held that employees had the right to work without observing the rotation rule, and that the threats were violative of the Act. The case of *Truck Drivers Local* 449 *v. NLRB,* 353 U. S. 87, 96, was not at all pertinent to

any subject under scrutiny here. It held that the Board had the authority to prescribe multi-employer units in accordance with the congressional intent. In *NLRB v. Babcock & Wilcox Co.,* 351 U. S. 105, the court held that the rights of organizers to visit the plant were matters for administrative adjustment, but nevertheless scrutinized the Board's consideration and set it aside. In the consolidated cases of *NLRB v. United Steelworkers (Nu-tone, Inc.),* and *NLRB v. Avondale Mills,* (1958) 357 U. S. 357, 78 S. Ct. 1268, 2 L. ed. (2d) 383, the United States Supreme Court reviewed two cases involving administration of the Board's no-solicitation rule. The Courts of Appeal had reached different conclusions. The Court held that the Board's decision in both cases should be voided because of the lack of findings by the Board so as to enable the court to judge whether it had acted properly.

H. Answer to "II. Substantial evidence supports the Board's finding that Lewis was denied job referrals in violation of the" discrimination and coerce-restrain provisions of the Act.

The factual situation is confined within the period March 15, 1956 to May 14, 1956, because after that date the union's activities consisted of inducement to drop the charges. Subsequent to that date there are no findings of discriminatory conduct. The Charges filed by Lewis recited general discriminatory misconduct by Local 242 as to contractors generally. However, the complaint alleged discriminatory conduct only as to the AGC-contractors and only under the hiring hall clause. Since there were no requisitions from these affiliates, there was no discriminatory conduct. Since there was no discriminatory conduct alleged as to other contractors, no

findings could be made within the issues. True, both the Trial Examiner and the Board recited these numerous events. The Trial Examiner said he could make no findings of discrimination as to either the AGC-contractors or as to other contractors. (R. 331). The Board adopted these findings (S. R. 197; footnote No. 3 SR. 197. S.R. 207).

True enough, the Board reversed the Trial Examiner on the "implementation" matter (R. 45; SR. 205-206), but the reversal was not as to the findings of fact. The reversal was of the Trial Examiner's *per se* views of the "clause, implementation and Lewis":

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30).
>
> "Hence, I do not agree that the provisions of Section 6 of the agreement between the AGC-Chapters and the District Council are invalid per se, and I find that by the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." (R. 30).

The dispute between the Trial Examiner and the Board is clearly one of law and not of fact, for the Board said (S. R. 197):

> "The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring hall it contains. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring."

The General Counsel has not presented the

situation of Lewis as to the Board's view of "implementation of the unlawful contract." The General Counsel makes non-administrative findings of fact of discriminatory practices based on an alleged preferential practice of the union to prefer members over Lewis. This was not an issue in the case and is not the subject of any findings of fact by either the Trial Examiner or the Board. The numerous cases cited by the General Counsel need not be considered.

Since Lewis is posed as an (innocent) "victim of the unlawful hiring system" (GC-Br. p. 34; S. R. 206), it is a case of *damnum esque non injuria.* The clause being legal, any implementation of it by means not otherwise unlawful, is likewise legal. Lewis' legal rights were not prejudiced.

I. Answer to "III. The Board properly found that Local 242 . . . attempted to compel Lewis by threats and promises to withdraw an unfair labor practice charge."

These findings are not subject to objection by us in the absence of exceptions. We concede that they are supported by substantial evidence.

IV. LEGALITY OF FIRST OPPORTUNITY CLAUSES

A. The Board Poses the "Clause, Implementation and Lewis" as *per se* Illegal.

1. *The Board Claims Discretionary Authority Mistakenly.*

The Board argues that the United States Supreme Court held in *Radio Officers Union v. NLRB,* 347 U. S. 17, 45, that where the employer conduct "inherently encourages or discourages union membership", despite absence of direct affirmative evidence of discrimination "it was imminently reasonable for

the Board to infer encouragement of union membership." In the Board's words "It is with this basic principle in mind that we judge this case and all exclusive hiring halls of this unrestricted and arbitrary type." (Opinion SR. 199-200). This language actually appears at p. 52, and on pp. 51-52 it appears that the quote is out of context and is not the holding of the court. *Radio Officers* is a consolidation of three cases. In *Gaynor* the union was obligated by law to negotiate the same wage scales for all employees but nevertheless executed an agreement which gave the union employees a higher wage. The court stated that certainly "the natural result of the disparate wage treatment in *Gaynor* was encouragement of union membership; thus it would be unreasonable to draw any inference other than that encouragement would result from such action" and "Obviously, it would be gross inconsistency to hold that an inherent effect of certain discrimination is encouragement of union membership, but that the Board may not reasonably infer such encouragement." (p. 51). In *Teamsters* Fowler was discharged at the request of the union because he had worked out of order under the union's unilateral rotation plan. The court stated (p. 52):

> "The circumstances in *Radio Officers* are nearly identical. In each case the employer discriminated upon the instigation of the union. The purpose of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership. Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices. . . . Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of

the union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved."

This case, as do all the others, holds that there must be some overt act, where the clause is patently lawful, to constitute discrimination of a nature from which it would be reasonable to infer "encouragement".

2. *Board Objects to Hiring Halls only When Exclusive.*

The Board holds that "The vice in the contract here considered and its hiring hall lies in the fact of unfettered union control over all hiring, and our decision is not to be taken as outlawing all hiring halls." (SR. 201). The General Counsel agrees (GC-Br. 12; 28).

3. *Board Infers "encouragement" from the exclusive feature.*

The Board's inference is not from any evidence of discriminatory conduct by Local 242 in this case (the Trial Examiner and the Board have not made any findings of discriminatory conduct by the union as to the AGC-contractors nor as to employers generally). The Board states (Opinion SR. 204-205):

"We would draw a similar line between the type of unfettered arbitrary hiring hall present here and one including the safeguards set forth above. The first case, revealing an unexplained and autocratic union fiat, fully warrants an inference of unlawful encouragement despite the absence of literal membership requirement; the latter situation, with its assurance to would-be

employees . . . . effectively rebuts any inference of unlawful union encouragement, and therefore does not support an inference of illegality."

4. *Question of Law or Question of Fact.*

(a) Board Poses "clause, implementation and Lewis" as a Question of Law (see Supra pp. 5-8).

(b) General Counsel Poses as Question of Mixed Law and Fact.

The General Counsel commingles *per se* consideration, with the "reasonable man" and non-administrative findings of facts (see supra pp. 5-8).

B. Hiring Hall Illegality Is A Question Of Fact.

1. *Legislative History.*

The Board (Opinion SR. 201-202, footnotes No. 8 and No. 9) has set out the legislative history after the 1947 Amendments were adopted (*Senate Report No.* 1827, 81*st Congress, Second Session, Committee on Labor and Public Welfare*). Senator Taft's comments could then reflect his considered opinions that:

> "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them . . . Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." (SR. 202, footnote No. 9).

Member Murdock wrote a dissent to an opinion which has not been published. It is obvious that the

Board's first unpublished opinion provided for the parties to negotiate "objective criteria", while the opinion (SR. 194, 202-203) requires specific criteria (Appendix No. 4). The Board states that it will approve exclusive hiring hall clauses *only* if they contain these criteria (SR. 202). It is apparent that member Murdock opposed all criteria whether objective or specific for he said (R. 62):

> "Nothing in Senator Taft's statement suggests or permits the conclusion that hiring halls without objective criteria are somehow evil and contrary to the Statute, but that hiring halls with such criteria are perfectly lawful as the majority finds. Senator Taft was in agreement with previous Board and court decisions to the effect that where the General Counsel had proved that an ostensible non-discriminatory hiring hall, was, in fact operated as a closed shop, or in an otherwise discriminatory manner, the practice was unlawful."

During the preceding session in the debates that preceded enactment of the 1947 Amendments Senator Taft cited examples of closed shops, particularly in the maritime industry on the West Coast, but stated that if:

> "the employer wants to use the union as an employment agency he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the *men recommended by the union.*" (emphasis ours)[11]

With regard to the types of union security clauses and hiring hall clauses that would be held illegal, it is clear that only those which specifically provided for closed shop (or preferential hiring) on their

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[11] 93 Cong. Rec. 3836, II Leg. Hist. 1010; also see I Leg. His. 412, S. Rep. No. 105, 80th Cong., 1st Sess.

face. During the debate in a colloquy, Senator Donnell inquired whether under the Bill "an agreement providing that an employer would not employ anyone who was not already a member of the union, would be invalid", Senator Taft replied:

> "That is correct. I think the most direct case of that sort is to be found in the Maritime Industry on the Pacific Coast. *The testimony was that a provision similar* to the one the Senator from Missouri has referred to *led to a condition* on the ships engaged in the Alaska run *where there was no discipline* whatsoever . . . Of course, under such an arrangement a *man could not even get a job* unless the Union admitted him to union membership. The Bill will make such a contract *illegal.*"[12] (emphasis added).

2. *The (majority) Board Reverses Itself sub silentio.*

The General Counsel is not correct in his footnote statement (GC-Br. 16 No. 12) in asserting that "the legality of hiring halls under the Act has not been comprehensively treated by the Board in its decisions prior to this case.' and "The dicta relating to this issue that has appeared in earlier Board cases, however, do not appear to reflect a consistent position." The case *In re The Lummus Co.,* 101 NLRB 1628 is not *contra* to the other cases because as pointed out at p. 1637 the complaint did not allege, nor was there any proof as to what the agreement was between the respondent and the union. The order of the Board only went against discriminatory practices. The other cases are harmonious that hiring hall clauses of the "first opportunity" feature are not illegal. In *National Union of Marine Cooks and Stewards,* 90 NLRB 1099 (1950), 1106, member Reynolds dissented by forcing the issue thus:

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[12]Leg. Hist. 1421.

> "delegation of such complete and absolute control over hiring . . . would without more be tantamount to discrimination against non-members."[13]

This court in *Swinerton* construed the holding in that case to be, thus, (p. 514):

> "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against non-members in the issuance of referrals,' We do not believe *National Union of Marine Cooks and Stewards,* 90 NLRB 1099 (1950) supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the Board did not indicate that a referral system was *per se* improper absent a 'guarantee' of non-discrimination."

In *Pacific American Shipowners Association,* 90 NLRB 1099, there was an exclusive hiring hall clause which *expressly* banned discrimination by the union, and the Board held that the clause was not unlawful, pointing out that "the provision contained in the proposal that personnel be secured through the offices of the Respondent (the union) does not, on its face, require discrimination because of union affiliation (p. 1101)." Trial Examiner Marx in this case reasoned similarly to this court in Swinerton stating (R. 30):

> "In that regard, it may be noted that the Board in the Pacific American Shipowners case appears to have considered the statement of such a prohibition as an added, rather than the controlling, reason for its conclusion that the

[13] In that case the clause provided on its face for non-discriminatory administration. Reynolds took the position that no language could cure the vice of exclusive hiring clauses, and that the phrase was "windowdressing."

> hiring provision there involved was not unlawful. The sum of the matter is that the long standing precedent of the Pacific American Shipowners decision is applicable here . . . "

Further, the Trial Examiner in the case of *Int. Asso. of Heat & Frost Insulators, etc. Local* 31 (Rhode Island Covering Co.), 114 NLRB 1526, in considering a similar clause stated (p. 1536):

> "I do not agree with the General Counsel's contention that the contract was violative of the Act on its face. It does not of necessity imply that the Company understood to hire only union members." (then in a footnote states:) *"George D. Auchter Co. et al,* 102 NLRB 881, enfd. 209 F. 2d 273 (CA-5) cited by the General Counsel, involved a similar contract provision. While both the board and the court there held the provision illegal, it appears that they did so not on the basis of the provision standing alone, but rather 'in the light of the interpretation placed upon it by the Respondent'."

Very recently, the Board did not find an identical contract between the same AGC-Chapters and a sister union to Local 242, to be objectionable. In *Mountain Pacific, Seattle, Tacoma Chapters, etc. and Int. Hodcarriers Local* 276 (April 22, 1957), 117 NLRB 1319, the contract was identical except the word "contractors" was used in the place of "employers". The Board stated (1319-1320):

> "We find it unnecessary to pass upon the validity of the union security language . . . we do find . . . (1) that the manner of administration of the above contracts constitute a violation of . . . the Act."

And, we have this court's statement as to the Board's holding in *Hunkin-Conkey,* (*Swinerton* p. 514).

"This rule which we deem proper was recognized by the Board in Hunkin-Conkey Construction Co., 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel'."

For the long line of Board precedent, Hunkin-Conkey cited:

Missouri Boiler and Sheet Iron Works, 93 NLRB 319

Firestone Tire and Rubber Company, 93 NLRB 981

National Maritime Union, 7 NLRB 971

For additional precedent, see:

American Pipe and Steel Corp., 93 NLRB 54
Port Chester Electric Company, 97 NLRB 354
Juneau Spruce Corp., 90 NLRB 1805

Universal Food Service, Inc., 104 NLRB 1, 32 LRRN 1052.

Further, the Board has considered that its holdings heretofore have been to recognize the *per se legality* of such clauses, witness 19*th Annual Report of the Board,* p. 121, GPO (1954):[14]

". . . in several cases the Courts enforced orders remedying (discriminatory practices."

"Those cases reaffirmed the principles that (1) while a hiring hall referral arrangement is not in itself improper, Section 8 (a) (3) is vio-

[14] See also in accord:
14th Annual Report, p. 84, 86, GPO (1949)
15th Annual Report, p. 131, 179, GPO (1950)
16th Annual Report, p. 215, 217, GPO (1951)
17th Annual Report, p. 149, 230, GPO (1952)
21st Annual Report, p. 101 (1956)
22nd Annual Report, p. 88 (1957)

lated if the arrangement results in the discrimatory referral and hiring of union members. citing Eichleay v. NLRB . . . . NLRB v. Philadelphia Iron Works)"

3. *All Courts of Appeal Hold Hiring Halls to be per se Legal.*

In five circuits, the Courts of Appeal have considered first opportunity clauses patently legal and have upheld their legality "absent a guarantee that the union does not discriminate against non-members in the issuance of referrals. These cases are set-forth chronologically. This question was not presented in the *National Maritime Union* case, *infra.*

(a) *NLRB v. National Maritime Union* (CA-2, 1949), 175 F. 2d 686, presented a first opportunity clause which the Board held legal and that issue was not before the court. The Court quoted the Board as upholding the legality of a clause similar to the one here involved (p. 688):

> "Suffice it to say that the Board did not hold violative of the Act the mere hiring-hall provisions of the agreement which respondents demanded of the employers. In its decision, the Board said:
>
> > 'The hiring-hall provision in question does not on its face require that the companies discriminate in favor of the NMU members. Unlike the so-called 'closed-shop' contract, by virtue of which the employers are required to hire only such persons as are members of the contracting union, this provision requires only that the employer hire such persons as are supplied by the Union unless the Union is unable to provide the needed replacements'."

(b) *Del E. Webb Construction Co. v. NLRB* (CA-8, 1952) 196 F. 2d 841, 845, was cited by this court

in *Swinerton, infra,* with approval. There was an issue as to whether the contract provided for union preference, and the court decided that it did not and was legal:

> "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire only union members referred to the employer. See *American Pipe and Steel Corporation,* 93 NLRB 54."

(c) *NLRB v. Swinerton* (CA-9, 1953), 202 F. 2d 511, 513-514 involved two contractors who were installing machinery. While the labor contract with the Millwrights Union stated that "there was no limitation of the employer as to whom he shall employ", yet the hiring foreman misunderstood it and told the machinists officer and some six machinists applicants that applicants must get millwright clearance. Two of the machinists applied at the Millwrights for clearance and were told that no clearance would be granted and they would have to take an examination and pay $50. The factual situation was tantamount to a contract requiring union membership and a consistent practice. The court was, however, presented with the *per se* issue because of the position of the Board (p. 514):

> "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against non-members in the issuance of referrals'."

This court first decided that this was not the rule of the Board and stated (p 514):

> "Such a rule in practical effect shifts the burden on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized

by the Board in *Hunkin-Conkey Const. Co.,* 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 NLRB at 435, Cf. *Del E. Webb Const. Co. v. NLRB,* 8 Cir., 1952, 196 F. 2d 841, 845."

This court has followed Swinerton in *NLRB v. Thomas Rigging Co.* (CA-9, 1954), 211 F. 2d 153, cert. denied 346 U. S. 814, and in *NLRB v. ILWU Local* 10 (CA-9, 1954), 214 F. 2d 778, 781. In both cases, the hiring hall was discriminatorily operated and enforcement went only against these practices.

(d) *NLRB v. George D. Auchter Co.,* (CA-5, 1954), 209 F. 2d 273, 277 involved a first opportunity clause which was administered by the parties so as to require union membership. The Board's order and the court's enforcement went to the illegal manner in which it was administered. The Board did not contend and the court did not hold that the clause on its face violated the Act.

(e) *NLRB v. F. H. McGraw & Co.,* (CA-6, 1953), 206 F 2d 635, 639 cites with approval the preceding cases of *Swinerton* and *Del Webb Cons. Co.* It not only holds that a first opportunity clause not preferential on its face is legal, but destroys the foundation on which the Board's position is lodged. Here, there was a closed shop written contract which was proscribed by law (p. 639), however

"In the instant cause, there was no unlawful discrimination against any individual employees, because, in spite of the fact that it was the normal policy of the union to give preference, first, to its own members, so many workmen were required for this gigantic building

> project that everyone who applied was accepted and employed, if qualified for the work with few exceptions not here relevant."

This case goes further than the preceding cases. In *Webb* the agreement was not to hire only union men, and men were hired at the jobsite. Here, the agreement was to hire only union men and there was no jobsite hiring. Yet the court reached the same result. The cases can be reconciled on the basis that here, although there was an executed closed-shop agreement, it was not "maintained" in the sense that anybody knew anything about it. In the *Mountain Pacific* case the same situation exists as to "maintenance."

The court found that everybody who applied to the union was hired for the job. The practice was tantamount to an exclusive hiring hall agreement which was non-discriminatory on its face. The court stated (p. 640):

> "The action of an employer in hiring workmen through a union by means of referrals from the union is held not to violate the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel."

(f) *Eichleay Corp. v. NLRB* (CA-3, 1953), 206 F 2d 799, 802, 803, cited with approval the preceding cases of *Webb, Swinerton* and *McGraw*. Here the international agreement with the employer required it to employ carpenters in preference to machinists and to comply with the local agreement, which in turn provided that the company would call the union for help, would refer all applicants to the union, and require carpenter membership. The union in practice preferred carpenters over machinists. Officials of the machinists union asked the company to em-

ploy machinists which was refused on the basis of the agreements. The court in effect distinguished the facts in the *McGraw* case by holding that it is "knowledge" of the discriminatory contract that makes it illegal, and that in such a case, job seekers are excused from applying (p. 803):

> "Given an agreement which discriminates in favor of the carpenters and knoweldge of that fact on the part of the IAM members,, it is certainly reasonable to conclude that no one applied because it appeared futile to do so, and that such agreement, in and of itself, encourages membership in the Carpenters Union."

The court stated (p. 803):

> "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer. A referral system is not per se improper, absent evidence that the Union unlawfully discriminated in supplying the company with personnel."

(g) *NLRB v. Int. Asso. of Heat & Frost Insulators, etc. Local* 31, CA-1, decided December 4, 1958, (unreported); CCH. par. 65,060; 43 LRRM 2207 confirmed the position of the Board that a first opportunity clause identical with the one in the instant case was legal:

> "It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with necessary workers. However, if this system is operated so as to discriminate against non-union workers and makes possible only the

employment of union members, it is unfair labor practice."

In this recent case the Board held that a first opportunity clause was not per se illegal, in the words of the court:

> "The Board first found that the 'first opportunity' clause of the agreement, *supra,* between the Company and the Union, while not violative of the Act on its face, was carried out in such a discriminatory manner so as to prefer Union members and therefore, violated both Sec. 8 (b) (1) (A), and because it caused the Company to discriminate, Sec. 8 (b) (2) of the Act."

C. Situation of Applicants Applying for Work.

The Board has held that it is immaterial that there is no evidence in the record that there were any requisitions from the AGC-contractors on the days when Lewis applied for work (SR. 207). The Board assumes that "Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance . . . " (SR. 207). The Board asserts that these "are matters for investigation in the compliance stage of this proceeding." (SR. 208).

The Trial Examiner had the same problem and decided that the existence of a job, and its counterpart, application for a job was a necessary component of liability and not a matter of remedy (R. 34):

> "However, the General Counsel takes the position in his brief, as he did, in effect, at the hearing, that 'the determination of the extent of the discrimination' is a matter for the compliance stage of the proceeding . . . . The General Counsel's position, and his reliance upon cited case, beg the question, for what is at issue here is not 'the determination of the extent of the

> discrimination,' but whether the evidence will support a finding of discrimination, whatever its extent, by members of the AGC Chapters . . .; there can be no finding that it (Local 242) discriminatorily exercised the authority delegated to it by members of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242 . . . "

The General Counsel argues (GC-Br. 18):

> "no evidence of an actual refusal to hire or a discharge is necessary . . . ; (that applications for work) would be a 'futile gesture' and (the applicants) are therfore excused from testing the matter."

Where the discriminatory practice is established by independent evidence and jobs are given to members of the union, non-union persons do not have to apply for jobs under the authority of

> *NLRB v. Swinerton* (CA-9), 202 F. 2d 511, 514
> *Eichleay v. NLRB* (CA-3), 206 F. 2d 199, 803
> *NLRB v. Waterfront Employers* (CA-9), 211 F. 2d 946, 954
> *NLRB v. Local* 420, *United Association of Journeymen and Apprentices* (CA-2), 239 F. 2d 327, 330

However, general discriminatory practices by Local 242 is not within the issues, and there are no findings to that effect under the issues. Secondly, here there were no job requisitions, nor union members working.

Where the employer refers applicants to the union with the statement that they must get clearance from the union, and the union discriminatorily refuses to dispatch them, these applicants do not not have to re-apply, if jobs were not then existing,

at a later time when the jobs exist. Further, as to a group of applicants, where all are told by the employer to get clearance from the union and the union discriminatorily refuses to dispatch some, the others do not have to apply.

Swinerton; Waterfront Employers, supra.

Where the contract is proscribed and was maintained, but not executed, implemented or administered, we know of no cases where back wages were given to a charging party when he did not apply for a job, or when there was no job available. In this situation, the Board has dismissed complaints. In *Newton Bros. Lumber Co.* (1955), 103 NLRB No. 46, 31 LRRM 1557, the Board held that the lack of an allegation in the complaint by the General Counsel that there was a job available and that the charging party was qualified for an available job, bars a finding of discrimination. In *Monart Motors Co.* (1953), 103 NLRB No. 90, 31 LRRM 1564, the Board refused to find that a respondent-employer had committed an unfair labor practice for refusing to hire an applicant because the applicant was requested to drop an unfair labor practice filed against another employer, where the evidence failed to show that there was a position available for the applicant (the applicant wanted part-time employment).

D. Enforcement of General and Broad Orders Obnoxious to Courts.

Here, the Board wants enforcement of what the Board terms a *per se* illegal contract, in the absence of findings that it has been enforced, administered and implemented. Assuming for the moment that there is a proscribed contract, the courts have shown reluctance to enforce Orders of the Board which are

general and which go beyond the specific acts found to have been committed by the respondents.

The position of the Board here is that a non-discriminatory exclusive clause might be administered in a discriminatory manner, but not necessarily so. Its position is basicly that it wants enforcement of a general order enjoining the respondents from violating the Act in a general way.

In *Lummus,* and *Shuck, supra,* the courts restricted the enforcement to those specific acts which the court found had been violated and refused to enforce a general order which enjoined violation of the Act in general terms. The reasoning behind these cases was aptly stated by the United States Supreme Court in *NLRB v. Express Publishing Co.* (1940), 312 U. S. 426, 435. In that case the employer was found to have refused to bargain in good faith and the Board order adopted the phraseology of Sec. 7 and banned violation. The court stated (435):

> "In view of the authority given to the Board by Sec. 10 (c) is carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of Sec. 10 (e) authorizing the courts to modify the order of the Board in whole or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. . . . In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings try alleged violations of the NLRA not in controversy and which are not similar or fairly related to the unfair labor practices which the Board has found."

It would seem that the statutory language of the

Act, Sec. 10 (e) and the *Administrative Procedure Act,* Sec. 1007 requiring substantial evidence to support findings of the Board, would mitigate against any assumption that the parties in executing an exclusive hiring hall clause intended to violate the Act by discriminatory enforcement. The courts not only require explicit findings of misconduct, but that the findings be supported by substantial evidence (supra pp. 15-19). This assumption does violence to both rules.

E. Legality of Specific Safeguards.

(1) *The Board's Decision and the General Counsel Contrasted.*

The Board held that it would "find a (hiring hall) agreement to be lawful on its face, *only if the agreement explicitly provided that*: . . . . " (emphasis added). It stated further that it was not interested in the evidence of practices pursuant to implementation, enforcement and administration (SR. 197), nor was it interested in whether the employers subject to the agreement had any job requisitions (SR. 207).

On the other hand, the General Counsel stated that "nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance no showing of unlawful encouragement can be made", and that this decision is based on the assumed unique facts in the building and construction industry. (GC-Br. 21, 28).

Subsequent events prove the General Counsel in error. [15] In fact, the *General Counsel* in a *public* state-

[15] In (Miller dba) KM & M Construction Co., 120 NLRB No. 140, CCH par 55, 398 (1958), the Board held "that the **Mountain Pacific** case laid down three criteria which if met **fully** and **in toto** would save (a hiring hall) arrangement from the

ment on June 27, 1958, 42 LRRM 261, 267, in response to a question inquiring whether the union and employer can agree that workers will not be rejected by the Employer save for "good cause", stated that:

> "in the light of the *unqualified language* in which this criterion (Employer's right to reject) is phrased it would seem that the right of rejection contemplated thereby is an *unconditional* one, in no way limited, for example, by considerations of good cause as (the inquiry) suggests." (emphasis added).

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interdiction of the Act. Though the clause in question in the instant case met one of the three criteria, the reservation to the employer of the right of rejection . . . it failed to meet the other two criteria. It therefore did not meet all of the criteria required" (emphasis by the Board). The Board has applied this formula not only to written agreements but to practices, **Hod Carriers Local** 324, **Roy Price, Inc.,** August 14, 1958, 121 NLRB No. 55, CCH, par. 55, 630.

Further the Board has applied this doctrine to all hiring halls irrespective of industry:

Houston Maritime Association, 121 NLRB No. 57, 42 LRRM 1364 (shipping industry), where the contract contained provisions against discrimination;

Los Angeles-Seattle Motor Express, Inc., 121 NLRB 205, 43 LRRM 1030 (trucking); pending on Pet. for Rev., Court of Appeals for District of Columbia;

Philadelphia Woodwork Co., 121 NLRB No. 201, 43 LRRM 1031 (manufacturing);

E & B Brewing Co., 122 NLRB No. 50, 43 LRRM No. 118 (brewing industry);

Plumbers and Schenley Distillers, Inc., 122 NLRB No. 16, 43 LRRM 455 (distilling industry);

Further, the Board's Brown-Olds remedy *(In re United Association, etc.,* 115 NLRB 594, 37 LRRM 1360) which requires both unions and employers to refund all dues, initiation fees, etc., paid by all members or applicants (regardless of whether they were involved in the proceeding) commencing with the period beginning 6 months prior to the filing of the Charge, is now applied to *Mountain Pacific* cases. Cf. In re Houston Maritime Assn., and Los Angeles-Seattle Motor Express Co. cases supra.

(2) *"CLASS" Determination by the Board is Illegal.*

The Board's decision here regulates hiring halls *as a class* in all industries, including the building and construction industry, by requiring three specific "criteria" to be set forth in the written agreements. In *NLRB v. General Drivers Local* 986, (CA-5), 225 F. 2d 205, 209, the Board was reversed for prescribing a situs test to judge the propriety of picketing:

> "Indeed such a theory would . . . elevate the Board 'formulated criteria' by judicial fiat to a vantage point from which it could in effect, circumvent the statute . . . (by) substituting Board inferences, based purely on its judgment as to propriety and arequacy of the means employed . . . for the sole statutory test of unlawfulness . . ."

Although the Board has some power to decline to assent to the exercise of its jurisdiction on a case by case basis, its declination of jurisdiction over labor unions as a class was arbitrary. *Office Employees Int. Union, Local* 11 *v. NLRB* (1956), 353 U. S. 313. Similarly, with respect to the hotel industry, it was held that the Board could not decline to assert jurisdiction. *Hotel Workers v. Leedom,* ..... U. S. ....., 3 L. Ed (2d) 143, 79 S. Ct. 150.

(3) *Effect of Criteria in General.*

The Board will not approve an exclusive hiring hall clause unless it contains *all* these rigid, inflexible criteria:

(a) the requirement for non-discriminatory language is imposed as a remedy prior to the commission of any discriminatory conduct, and is the normal remedy imposed by the Board in hiring cases after complaint, hearing and conviction for violat-

ing the discrimination provisions, except that the proviso "except as authorized by Section 8 (a) (3) of the Act" is not included;

(b) the second requirement gives the employer the unqualified right to reject any job applicant, and thus immunizes conduct which we think is violative of the Act;

(c) the third requirement of posting, in effect requires both to state publicly that they will not violate the Act, and state that the employer can violate the Act by unqualified right of rejection.

(4) ***Posting Criteria.***

Sec. 10 (*a*), (*b*) *and* (*c*) provide that the Board to prevent any person from engaging in an unfair labor practice must follow the procedure of a Charge filed by a person claiming to have been injured by the violation, investigation, complaint, notice, hearing in accordance with rules of evidence prevailing in district courts of the United States, findings supported by substantial evidence, and order. Only thereafter may the Board prescribe and secure enforcement of "such affirmative action . . . as will effecuate the policies of the Act." *Garner v. Teamsters,* 346 U. S. 485.

The requirement for posting for the duration of the agreement constitutes an improper, unwarranted and unauthorized imposition by the Board. The Board prescribes a remedy in advance of a discrimination violation, and brands the parties as perpetrators of Section 8 (b) (2) and Sec. 8 (a) (3) violations, without the statutory safeguards. It requires more because the Board has never previously ordered the posting of the agreement.

(5) *Right to Reject Criteria.*

The employer does not have an unqualified right to reject any or all applicants referred by the union under the Act. He could use that power to "encourage" or "discourage" union membership. He cannot lawfully reject an applicant because he is or is not a member of the union, nor because he has filed charges or given testimony under the Act, or for any other ground which would constitute a violation of Sec. 8 (a) (1).

Employers have the duty, it would appear, to bargain regarding initial employment *Brown & Root, Inc.* 86 NLRB 520, and to bargain over future reemployment of laid-off employees, seniority and grievance procedure *In re Hagy,* 74 NLRB 1455; *West Boylston Mfg. Co.,* 87 NLRB 808. It is common to have clauses in labor agreements in which employers agree not to reject applicants for union activity, preferential right of old employees on recall, seniority, etc. If the employer refused to negotiate, the Board would make him bargain, and after an agreement is reached, the Board would make him put it in writing. An adamant employer could nullify such provisions by the power of rejection, which the Board gives him as an unqualified right. By the right of rejection, the employer can nullify constitutional rights by discriminating because of race, color and creed. [16]

The sanctity of the collective bargaining process was recently brought to the attention of the Board

[16] This is not to say that employers here follow discriminatory practices. However, we do not wish to minimize our interest in these subjects. The Unions here involved, through their International, are open unions, accepting into membership all who follow the calling, and is the largest of the building and construction unions. The union is a melting pot for all races, colors and creeds.

by the United States Supreme Court, *Local* 1976, *United Bro. of Carpenters v. NLRB,* 357 U. S. 93, 108, 2 L. ed (2d) 1186, 78 S. Ct. 1011, in holding that the Board "has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice."

Again, in *NLRB v. Rockaway News Supply Co.,* 345 U. S. 71, 75, 79, 73 S. Ct. 519, 31 ALR (2d) 511, 97 L. ed 832, the court stated:

> "Substantive rights and duties in the field of labor management do not depend on ritual reminiscent of medieval property law. . . . There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves . . . "

F. The Use of a Labor Pool is Not Violative of the Act.

In *Hunkin-Conkey,* 95 NLRB 43, the Board found that an agreement whereby personnel was secured through the union was not violative of the Act, absent unlawful discrimination. To the same effect is *Missouri Boiler and Sheet Iron Works,* 93 NLRB 319; *Firestone Tire and Rubber Co.,* 93 NLRB 981; *National Maritime Union,* 78 NLRB 971; *American Pipe and Steel Corp.,* 93 NLRB 54; *Port Chester Electric Company,* 97 NLRB 354; *Juneau Spruce Corp.,* 90 NLRB 1805; and *Universal Food Service, Inc.,* 104 NLRB No. 6, 32 LRRM 1052.

V. SHIFTING THE BURDEN OF PROOF.

We have already explained the substantive law implications of the Board's *per se* views. The procedural problem is no less serious, involving the shifting of the burden of proof. This court's *Swin-*

erton, supra, and member Murdock (R.58-59) considered the problem solely in its procedural aspects.

1. ***Clause Without the Criteria Held a Discriminatory Violation.***

The Board, by not requiring proof of discriminatory practices, is deciding discrimination and derivitively coerce-restrain violations from the mere execution and maintenance of the agreement (maintenance refers to publication only). The *per se* view of the "clause, implementation and Lewis" makes execution and maintenance violative of the Act even when enforcement, implementation and administration is non-discriminatory. This ridiculous result flows from the Board's views that evidence of discriminatory practices or lack of them is immaterial (SR. 197) and evidence of requisitions is immaterial (SR. 207-208). The General Counsel's "counter-point" statament (GC-Br. 21) is not the Board's position and is a gratuitous inconsistency.

This result would not follow if the Board (or General Counsel) assumed the burden of proving the facts. The General Counsel argues that actual discriminatory practices make-up the Board's case (supra p. 27-28), and that the Board's case cannot be stated independently of the practices (GC-Br. 27, footnote No. 20). He states that he is willing to assume the burden of proof under *Swinerton,* but limits the burden to a showing of inferences and not discriminatory facts (GC-Br. 32-33). This is not enough.

2. ***General Counsel Assumes Burden Only When Clause Contains Criteria.***

We assume that the General Counsel would assume the burden of proof to show discriminatory

practices when the clause contains the criteria. But the statute and decisional authority makes no such distinction. Murdock confronted the majority of the Board with this court's views in *Swinerton* over three months before the Board released its final opinion (R. 58-59) but the majority ignored the decision and stated no basis for avoiding its impact.

3. *Argument—General Counsel Has Burden to Show Discriminatory Practices.*

It is commonplace, particularly in criminal prosecutions, where the *corpus delicti* is shown to have been committed, to resort to motive and opportunity to identify the defendant as the wrongdoer. But motive and opportunity are not a substitute for proof of the commission of the act itself. Thus in *Interlake Iron Corp. v. NLRB* (CA-7, 1942), 131 F. 2d 129, the court refused enforcement based on the Board's findings of discriminatory layoff:—

> "It is not sufficient for the Board to show that the system is capable of being discriminatorily. It must go further and show that it was used discriminatorily . . . The Board cannot shift the burden of proof or impose what it chooses to call the duty of the company to go forward with the evidence by showing that the system of merit rating used in facilitating a layoff is subject to discrimination . . . The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man does not shift from the Board."

The rule was succinctly stated in *NLRB v. Gottlief* (CA-5, 1938), 208 F. 2d 682:

> "We also keep in mind that the burden is on the Board to prove affirmatively and by substantial evidence the facts which it asserts."

The burden never shifts is held in *NLRB v. Winter Garden Citrus Projects* (CA-5, 1958), 238 F. 2d 138:

> "It is not and never has been the law that the Board may recover upon failure of the respondent to make proof. The burden is on the Board throughout to prove its allegations, and this burden never shifts."

In *NLRB v. McGahey,* (CA-5, 1956) 233 F. 2d 406, cited with approval in *Swinerton,* it was held that respondent can remain mute and illegal inferences are not to be inferred:

> "The employer does not enter the fray with the burden of explanation . . . An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present substantial basis of believable evidence pointing toward the unlawful one."

This court stated in *NLRB v. Kaiser Aluminum etc. Co.,* (CA-9, 1954), 217 F. 2d 366:

> "The General Counsel has the burden of the issue. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based."

In *NLRB v. Reynolds International Pen Co.* (CA-7, 1947), 162 F. 2d 650, it was held:

> "The Board argues the discriminatory nature of these discharges as though the burden was upon respondent to exonerate itself of the charges made against it. The burden however, was upon the Board to prove affirmatively and by substantial evidence that (employees) were discharged because of union membership and activities and for the purpose of discouraging membership in the union."

To the same effect is *NLRB v. Union Mfg. Co.,* 124 F. 2d 332; and *NLRB v. Miami Coca Cola Bottling Co.,* (CA-5, 1953), 222 F. 2d 341.

This court subsequent to its *Swinerton* decision rejected the notion that respondent must undertake the duty of disproving unlawful conduct. *NLRB v. Thomas Rigging Co.,* (CA-9, 1954), 211 F. 2d 153. The appellate function was outlined in*NLRB v. Englander Company, Inc.* (CA-9, 1598), 260 F. 2d 67, 70:

> ". . . to view the evidence in the light of the record in its entirety and to set aside the order if not supported by substantial evidence."

VI. ERRONEOUS FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Footnote No. 3, S. R. page 197.

If the following statement constitutes findings of fact under the issues, and if "employers" refers to AGC-affiliates, then we except on the basis that the same is not supported by substantial evidence, to-wit (Footnote No. 3, SR. 197):

> "The Union admitted that in doing the *hiring* for the employers it always hires its *members in preference* to non-members, and that whenever a member is not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-member to any assignment. If the contract were not unlawful on its face, we would deem the record as a whole ample to support a *factual inference* that the *Employers* in fact *hired* hod carriers and common laborers through this union hall and that the Respondents in fact hired such employees on behalf of the contractors in the *closed shop manner* which the Union admitted." (emphasis added)

The first sentence, and the last clause of the last sentence, both relating to alleged discriminatory policy and practices of Local 242 were outside the issues, and these recitals, as well as other recitals by the Board and Trial Examiner were not the subject of any findings of fact of the existence of a dis-

criminatory policy. In fact, the Trial Examiner specifically stated that there was no evidence of a discriminatory policy as to the AGC-affiliates nor as to any other employer (R. 33-34, 35). See discussion supra pp. 12-15.

We have also urged *,ibid,* that the assertion that "Employers in fact hired hod carriers" and that they were dispatched by Local 242 does not refer to AGC-affiliates, but refers to other employers, outside the issues of this case. If we err, then we here assert that such an interpretation is not supported by substantial evidence. Such an interpretation would be in conflict with the Trial Examiner's specific findings, and in such cases the question is resolved by inquiring whether there is substantial evidence to support the Trial Examiner's findings. *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 490, 493. At p. 496, the court stated:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

To the same effect is the recent case by this court, *NLRB v. Englander Co., Inc.* et al, (CA-9 1958), 260 F. 2d 67.

We rely on the General Counsel's statement that he had no evidence of any requisitions (R. 223-224) by AGC-contractors.

B. Trial Examiner's Recitals of Requisitions by non-AGC Employers.

If it is asserted that requisitions by employers, not affiliated with the AGC-Chapters, is material to the issues and that this statement constitutes such

a finding, then we assert that it is not supported by substantial evidence. This statement is a summary of recitals by the Trial Examiner, to which we assert there is no substantial evidence, to-wit:

> "However, notwithstanding the season and the statements made to Lewis to the effect that no work was available, hod carriers were dispatched to jobs from the union's hiring hall, some repeatedly, on a substantial number of occasions during the months of March, April and May 1956, while Lewis was at the union's office seeking, and failing, to secure dispatch. Contrary to the claim advanced by Allman in his testimony, the evidence does not credibly establish that the hod carriers dispatched were specifically requested by the employers to whose projects they were sent." (R. 16).

We do not believe that there is any evidence to support this recital. He said that Allman's testimony was not credible (R. 16 footnote). The only testimony that there were jobs during this period was that of Allman, and we assume that the Trial Examiner believed him in part when he said that "contractors were calling their men back", meaning their former employees. However, the Trial Examiner is not entitled to believe something that Allman did not say. Allman said that these were phone calls from contractors who wanted to know the phone numbers and addresses of the former employees and that Allman supplied this information. Allman did not say that he was dispatching these men. (R. 165-166). The contractors had the right to call for specific men (R. 15). The Trial Examiner had no right to fill the vacuum. That vacuum was never filled because Lewis testified that he did not know of any jobs during that period, and if he had known of any jobs, he would have taken them (R. 156). This recital does not meet the standards of this court for

substantial evidence. In the recent case *NLRB v. Englander, Supra,* p. 72 this court stated:

> "We recognize the power of the Board to draw reasonable inferences from the evidential facts found at the hearing."

C. Trial Examiner's Recital that Local 242's Practices Applied to Non-AGC Requisitions.

We also except to that portion of the following recital of the Trial Examiner which assumes that there were jobs available:

> "I have no doubt that Allman repeatedly applied this policy to Lewis prior to the latter's dispatch on May 17 and referred union members to jobs in preference to Lewis because the latter was not a member of Local 242."

for the reason stated above.

D. Board's Recital That Lewis Would Have been Rejected By AGC-Contractors.

The recital "Had . . . (Lewis) gone to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance . . . " is not supported by substantial evidence. (S. R. 207).

This is merely a suspicion, not supported by any evidence. The Trial Examiner had the same suspicion (R. 35, footnote No. 15), but the Trial Examiner nevertheless refused to allow a suspicion to be the basis for a finding (R. 33-34, 35). If this is a finding by the Board, it is in conflict with the Trial Examiner's and must fail because the Board has not pointed out what witnesses it believes and what evidence it relies upon. *Universal Camera Corp v. NLRB,* and *NLRB v. Englander, supra.*

The AGC-Chapters sent out bulletins advising the affiliates not to require union membership as a condition of employment (GC. Ex. 5; AGC Tac. Ex. 1; R. 81-82; 89; 116). It is presumed that had Lewis

applied, they would not have rejected him for non-membership in the union.

E. Board's Finding That Local 242 Executed the Agreement.

Local 242 is not a signatory to the labor agreement (GC. Ex. 4). Local 242 was not charged in the complaint with "execution" of the agreement (par. XI), nor did the Charge of Lewis allege "execution". The Trial Examiner called the Board's attention to this condition of the record (R. 23, footnote No. 9). There was no evidence to support the Board's finding that Local 242 violated the Act by "executing" the agreement. (R. 45 and footnote No. 1; SR. 205 and footnote No. 11).

CONCLUSION

1. The contract was not executed or maintained (published). The Board's finding that Local 242 executed the contract was erroneous. The discriminatory practices, which are outside the issues, existed independently of the contract. The contract was not used as the cause, reason or justification for denial of dispatch of Lewis. It was never mentioned.

2. As a substantive law proposition, the Board's *per se* illegality holdings constitute conclusive presumption which does not require proof (SR. 197) and which precludes proof. It allows Lewis and "any employee or would-be employee who believes himself a victim of discriminatory practices" (Opinion SR. 203) back wages in the absence of requisitions for jobs and in the presence of actual *non-discriminatory* practices, because the practices are immaterial (SR. 197, 207). The rule in cases such as the Board's *Universal Food Service,* the Sixth Circuit's *McGraw* and this court's *Thomas Rigging Co.* would be reversed. In its procedural aspects, it not only shifts the burden of proof but removes it. Where the lawful

clause does not contain the safeguards, the General Counsel does not have the burden. He only has the burden when the clause contains the safeguards. The Board's *per se* views usurp the legislative prerogative in both aspects. The Congressional intent, sustained by all court decisions and Board decisions to this date, makes the illegality of hiring hall contracts turn on a question of fact—actual discriminatory practices.

3. The Trial Examiner and the Board specifically found no implementation (R. 33-34, 35; SR. 207). The Board misunderstood these findings in holding that there was implementation, and its disagreement with the Trial Examiner was not over the facts but over the *per se* attributes. Lewis is not entitled to back wages regardless of whether the contract is viewed as legal or illegal.

4. The Board assumes that the parties will violate the law with a lawful contract unless the contract contains clauses stating they won't violate the law. In case of violation of law, the Board does not need the prop of a contract violation.

5. The criteria do not eradicate the evil complained of. The reason for the criteria is a fear of a discrimination violation, but the Board nevertheless with an anti-discrimination clause holds the contract is discriminatory, absent the other criteria. The Board requires both parties to post that they won't violate the law, but that the employer can violate it in his right to reject.

This court should deny enforcement.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX No. 1:

Pertinent Statutory Provisions

The *Administrative Procedure Act,* 5 U. S. C. A. 1007, provides:

(b) . . . All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . "

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Rights Of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided* . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the

exercise of the rights guaranteed in section 7: *Provided* . . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . .

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in Section 8) affecting commerce. . . . .

(b) . . . the Board . . . shall have power to issue and cause to be served upon such person a complaint . . . : *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employee with or without back pay, as will effectuate the policies of this Act.

(d) . . . . . .

(e) . . . The findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive. . . . .

APPENDIX No. 2

D. Summary of the Intermediate Report

The Trial Examiner found that the contract with its hiring clause was not *per se illegal* (R. 30), either as to a violation of Sec. 8 (a) (1) (3) or as a violation of Sec. 8 (b) (1) (A) or (2) (R. 36); found that Local 242 had illegally induced Lewis to drop the charges in violation of Sec. 8 (b) (1) (A) of the Act (R. 37); found that the contract had not been implemented in the continuous rejections of Lewis for work because the only issue under the complaint was job opportunities afforded by the respondent AGC-Chapter affiliates "since there was no evidence since the effective date of the agreement that any of these members sought or requisitioned labor from Local 242" (R. 35); that there the issue was "whether the evidence will support a finding of discrimination, whatever its extent, by members of the AGC Chapters" (R. 34), and that "the critical fact is that there is no such evidence." (R.35); that the complaint does not allege that the AGC-Chapters by maintaining the hiring hall clause "discriminated in violation of Section 8 (a) (3) of the Act (see Par. XI of the complaint)" (R. 23, footnote No. 9), also see page 12 supra; that the complaint does not allege that the execution of the contract by any of the parties constitutes a violation of the Act (R. 23, footnote No. 8)—see Complaint, Board's Exhibit 1; that prior to Lewis' "dispatch on May 17 (Allman, dispatcher of Local 242) referred union members to jobs in preference to Lewis because the latter was not a member of Local 242" (R. 32-33); but nevertheless "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC Chapters (or, for that

matter, any other employer) discriminated 'with respect to the hire of Lewis,' as the complaint alleges, and that Local 242 caused such discrimination, within the meaning of the Act." (R. 33); that on May 9, 1956, Buchanan of Local 242, who had seen Lewis working in connection with moving a building, told Nielson that "he would place a picket line at the project unless Nielsen hired only union members for the work in progress there, but that Lewis nevertheless worked until quitting time and finished the job" (R. 17-18)[1]; that with respect to the Todd Shipyard job, he discredited Allman's testimony that the job required a much smaller man than Lewis (R. 32, footnote No. 14), but he disregarded the Nielson and Todd Shipyard episodes as being any evidence that "any members of the AGC Chapters (or for that matter, any other employer) discriminated with respect to the hire of Lewis, . . . and that Local 242 caused such discrimination within the meaning of the Act" (R. 33) because "the General Counsel advances no claim that Local 242 caused Nielsen (who is not a member of any of the Chapters) to discriminate against Lewis", "nor does the complaint include an allegation that Local 242 caused Todd's Shipyard to discriminate against Lewis. There is no evidence that the firm (Todd's)

[1]Nielsen testified that he was moving a building as a subcontractor, for the Teamster's Union (R. 117); which creates an inference that Buchanan's interest was on behalf of the Teamster's Union and does not represent the general policy of Local 242. There was no evidence to show how Buchanan knew that Lewis was working. Lewis testified that he had been at the union hall all morning, and on his way home, about noon, he saw the job in progress and was given a half-day's work moving this building for the Teamster's Union (R. 216). It is to be noted that the contract has no form of union security, and that Lewis was refused membership at a time when there was no work available according to Allman, Buchanan, and Lewis. because Lewis would "need the money to eat on." (R. 172).

is a member of the Chapters", nor that Nielson or Todd's satisfy the commerce requirements[2]. After finding no discriminatory practices, the Trial Examiner succintly concluded thus:

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30);

and:

> ". . . I do not agree that the provisions of Section 6 of the Agreement between the AGS Chapters and the District Council are invalid per se, and I find that the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." R. 30).

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[2]The Trial Examiner at the hearing struck the testimony as to the Nielsen job except as evidence of a general practice, undoubtedly on the basis of a general discriminatory practice by the union (R. 169). We can infer that the Trial Examiner made these findings because there was no other competent evidence of a discriminatory practice by Local 242. While there was no motion to strike the Todd episode, we may infer that the Trial Examiner disregarded this episode as constituting any evidence of a general discriminatory practice for the same reason.

APPENDIX No. 3

E. Summary of the Board's Decision and Order, and Opinion

The Board found that Local 242 had violated the Act by "executing" and maintaining in effect the hiring provisions in the Opinion (S. R. 205, footnote No. 11) and similarly in the decision and Order (R. 45, footnote No. 1)[3].

The Board posed the question (R. 197), and its legal conclusions, thus ((S. R. 197):

> "*The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because the exclusive hiring hall it contains. We hold the hiring hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring.*[3]"

The Board's footnote No. 3 is the subject of a serious dispute between the Geenral Counsel and these Respondents. It is discussed in the topic:

"F. Footnote No. 3, S. R. p. 197" (p. 12, 75)

The Board states: "However, we do not read the statute as necessarily requiring elimination of all hiring halls and their attendant benefits to em-

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[3]Lewis' Charge did not describe "execution", and the Complaint did not allege "execution." The Trial Examiner called the Board's specific attention to this state of the pleadings (R. 23, footnote No. 9). Further, the Trial Examiner in naming the parties to the Agreement had omitted Local 242 as a signatory (R. 10). The Agreement itself was before the Board (Board's Ex. 4). The Board's Opinion does not describe the signatories.

ployees and employers alike." (S. R. 201). "It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants." (SR 201, footnote No. 8). The Opinion relies upon the Congressional intent as evidenced by Mr. Taft's comments on the majority report, Senate Report No. 1827:

> " 'The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them.' "
>
> The Board and the Court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." (S. R. 202, footnote No. 9).

The majority held that an exclusive hiring hall agreement gives to the union the "unfettered union control over the hiring process" and violates the Act because of "the inherent and unlawful encouragement of union membership" (S. R. 202); and further, that the exclusive hiring hall agreement by itself proves "the allegation of discriminatory prac-

tices in hiring", "apart from all other evidence in the case." (S. R. 197).[4]

The Board then states that an exclusive hiring clause can be converted into an agreement which is "non-discriminatory on its face, *only* if the agreement explicitly provided that . . . . "

The three criteria which are rigidly imposed are to be inserted in all agreements providing for "referral to jobs . . . on a non-discriminatory basis", and the provision that the "employer retains the right to reject any job applicant referred to the union." The third criteria requiring posting of all provisions of the hiring arrangement including the safeguards. (S. R. 202-202).

The purpose of the safeguards is "to rebut the inference that . . . (the exclusive hiring clause) encourages membership in the Respondent Unions." (S. R. 205).

The Board finds violations of the Act:

"Accordingly, we conclude that the Respondent Employers have violated Section 8 (a) (3) (1) of the Act. and the Respondent Unions have violated

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[4] While the Board and the General Counsel have meticulously avoided the use of the term **per se,** the Trial Examiner used the term 4 times to describe this proposition, and member Murdock used the term twice. The Board has used the term in other cases,and the courts have used the term frequently. When the safeguards are inserted the Board states that the agreement is then "non-discriminatory on its face." (S. R. 202).

This definition by the Board not only describes the **per se** doctrine, but defines it. The Board states that the exclusive hiring hall agreement is inherently illegal, from which you can infer encouragement of union membership in violation of the Act.

We would paraphrase it by stating that the Board holds the clause creates a **conclusive presumption which does not require proof,** (and to test the **per se** doctrine, we would have to add) **and which precludes proof.**

Section 8 (b) (2) and (1) (A) of the Act, by executing and maintaining in effect the hiring provisions of their contract." (SR. 205). * The footnote explains that only Local 242 is found to have executed the agreement, within the six months statutory period.[5]

The Board further found:

"3. We also find, contrary to the Trial Examiner, that the implementation of the unlawful contract * in the rejection of Lewis' continuous applications for employment * was an unfair labor practice by both the Union and Employer Respondents. He was a clear victim of the unlawful hiring system being carried on." (S. R. 205-206).[6]

The Board makes the same recitals of evidence as the Trial Examiner with respect to the alleged discriminatory practices and treatment of Lewis, except the Board does not recite the Todd Shipyard episode, as does the Trial Examiner (although apparently he gave it little or no effect) and the General Counsel (S. R. 206-207).[7]

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[5] The Board did not have in mind that the AGC-Chapters were not charged in the complaint with a violation of Sec. 8 (a) (3), nor that Local 242 was not a signatory to the agreement. The Board did not consider that the complaint did not allege the violation of the Act by the "execution" as to any respondent.

[6] We understand this statement to mean that any implementation, enforcement or administration of a per se unlawful contract would be illegal, so that the denial of Lewis, or any other applicant of a dispatch, even on grounds which would in the absence of such a clause be lagel, is nevertheless an illegal implementation. The General Counsel on the other hand appears to take the view that implementation is illegal only when it is independently illegal, for instance, when the denial is on the basis of non-membership.

[7] However, the Board does not conclude therefrom that these recitals constituted discriminatory practices or conduct as to Lewis, because the Board stated that it was "unnecessary to determine whether there is sufficient evidence apart from

The Board relegated the question of requisitions by the "Respondent employers" on the days when Lewis was rejected "for investigation in the compliance stage of this proceeding", wherein the "amount of back pay" due Lewis can be determined (S. R. 207-208).

We have omitted the Board's argument on the numerous points.

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the contract to support the allegation of discriminatory practices in hiring." (S. R. 197). However, we must not ignore the footnote No. 3.

The footnote stated that the hiring hall was operated "in the closed-shop manner in which the Union admitted." The General Counsel says that the Board "found" that the AGC affiliates in fact used this hiring hall, and that the union applied its practices of non-membership discrimination as to the AGC-contractor requisitions. We will urge elsewhere, that the Trial Examiner held that the AGC-contractors did not requisition help and that there was no evidence in the case, under the isues, that the union applied the alleged discriminotary practices to the AGC-contractors or any other employers. There is nothing in this footnote which is contrary to what the Trial Examiner found, and we shall show that the word "employers" in the footnote does not refer to the AGC-affiliates. We conclude that there is also a lack of a finding by the Board that Lewis was the vehicle for the "implementation" of the contract.

APPENDIX No. 4

F. Summary of Murdock's Opinion

The Board's Decision and Order rendered Dec. 14, 1957 (119 NLRB No. 126) was conditioned upon the rendition of a Subsequent Opinion (R. 45), which came out over 3 months later on March 27, 1958 (119 NLRB No. 126-A). Murdock wrote a separate opinion (R. 55) which concurred in part and dissented in part (R. 63) on Dec. 14, 1957.

Murdock argued that previously the Board had held with the Courts that an exclusive hiring hall clause was not per se illegal (R. 55-56). He found it contrary to decisions of the Ninth, Sixth and Third Circuit Courts of Appeals.[8]

Murdock argued that since the law requires "that an exclusive hiring hall be administered in a nondiscriminatory manner . . . , the real issue here is whether, as the Court of Appeals for the Ninth Circuit pointed out, the burden of proof on the question of discrimination will be shifted from the General Counsel to the Union administering a hiring hall. In the instant case the majority presumes that the Union will administer an otherwise lawful con-

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[8]The scribe has erred because he in fact referred to a decision by the 8th Circuit. To the four decisions he referred to, to-wit (S. 27-28):

Del E. Webb Construction Co. v. NLRB, CA-8, 1952, 196 F. 2d 841, 845.

NLRB v. Swinerton, CA-9, 1953, 202 F. 2d 511, 514.

NLRB v. F. H. McGraw & Co., CA-6, 1953, 206 F. 2d 511, 514.

Eichleay Corp. v. NLRB, CA-3, 1953, 206 F. 2d 799, 803.

must be added the decision of:

NLRB v. Int. Asso. of Heat & Frost Insulators etc. Local 31, CA-1, Dec. 4, 1958. CCH par. 65,060, 43 LRRM 2207, (not officially reported).

Further, the rule has been confirmed in the Ninth Circuit thrice, and in the Third twice.

tract in an unlawful manner. This presumption is made conclusive unless the contract includes 'objective criteria' which will explain and justify 'the exclusive aspect of hiring hall referrals.' Only thereafter,I take it, will the burden of proof he shouldered by the General Counsel to establish that the Union nevehtheless administered the contract in a discriminatory manner." (R. 58-59).

Murdock considered the legislative intent (R. 59):

> "But the Statute places the burden of proof squarely on the General Counsel to establish in every case that a respondent before this Board has engaged in an unfair labor practice. The majority, indeed, admits that the statute does permit an exclusive hiring hall, pointing to the salutary objective served by such institutions and a statement by Senator Taft that the closed shop provision of the Taft-Hartley Act was not aimed at the hiring hall of the type administered in the maritime industry."

Murdock considered the injection of "objective criteria" on the basis of the majority's opinion as of Dec. 14, 1957 thus (R. 61):

> "The majority holds that the standards for referral of applicants are 'matters primarily for the employer and the union to negotiate and settle' so long as they fall within the majority's notion of 'typical objective standards.' But the majority is free in the very next case to hold that the union and employer have incorporated insufficient criteria or that the criteria adopted by the parties is not, in the majority's opinion, typical."[9]

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[9] It thus appears that the Board's opinion on Dec. 14, 1957 was withdrawn, and that the Board withdrew the plan for "objective criteria" and substituted rigid criteria, outside the scope of collective bargaining which would be the **only** ones that would meet the test (S. R. 202). We shall see that the

Murdock took the position that the question of illegality of hiring halls, where the agreement is lawful on its face, is a question of fact (R. 62), and that the burden of proof was on the General Counsel to show illegality (R. 58-59).

We are confused by Murdock's "concurring in part" because he made no recitals of the evidence nor findings of fact (R. 63).[10]

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permission of rejection gives the employer the right to reject applicants for illegal reasons. We therefore have the situation of both parties being required to post a notice that they will not violate the law and will follow certain rules, which rules in some aspects give the employers the unilateral privilege of violating the law.

[10] This is discussed at p. 17A.

APPENDIX No. 5

G. Rationale of Murdock's Opinion

Member Murdock wrote a dissent to a non-existent majority Opinion December 14, 1957, which presumably delegated to the parties the responsibility through collective bargaining to devise the criteria. He objected that the prescription of this formula was illegal because the legislative intent was to treat exclusive hiring halls no different than any other agreement, if they were patently legal. That is, the practice of the parties would determine the question of legality. Since this was a question of fact, the burden was on the General Counsel to prove an illegal practice. He objected, following the rationale of this court in *Swinerton,* that the adoption of a *per se* view would shift the burden of proof.[11]

However, we are confused by Murdock's "concurring in part", in the absence of any findings of fact by Mr. Murdock (R. 63):

> " would therefore find that the contract in this case is not *per se* unlawful, but that the union's discriminatory practices under it are unlawful, * including the coercion and discrimination as to Lewis." *

Both the Board and the General Counsel have ex-

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[11]The respondents also assert that the **per se** view affects the substantive rights of the parties and invades the function of the Congress. It would seem that a **prima facie** view would shift the burden of proof. A **per se** view goes further. The Board said that it was not interested in the evidence (S. R. 197). This is more than a **prima facie** doctrine, and more than simply shifting the burden of proof. It is a conclusive presumption which presumes proof and precludes proof. The General Counsel does not appear to present this view when he says that proof of a legal practice will not make a **per se** illegal clause violative of the Act. (GC-Br. p. 21). Only Congress can change the substantive rights of the citizenry.

pressed themselves. The Board's Decision and Order (R. 46) states:

> "(3) Also in disagreement with the Trial Examiner, we find that the implementation of the unlawful contract in the rejection of Lewis' continuous applications for employment was an unfair labor practice, and that the Respondent Unions thereby violated Section 8 (b) (2) and (1) (A) of the Act and the Respondent Employers thereby violated Section 8 (a) (3) and (1) of the Act." to which the Board appended footnote 2.

We have seen that under the issues the only *implementation* alleged was with respect to requisitions by the AGC-affiliates. We have also seen that the Trial Examiner found that there were no such requisitions. Footnote No. 3 S. R. 197 finds that requisitions were made by other employers, not affiliates of the AGC-chapters and outside the issues. The Board did not reverse the Trial Examiner's finding that the AGC-affiliates made no requisitions. There was thus no vehicle on which Lewis could implement the contract. We have seen that the Board mis-interpreted its own findings in this "(3) implementation" holding. Now, the disagreement with the Trial Examiner was not over the factual situation, but over the legal issue of whether *any* implementation would *per se* violate the Act.

Since Murdock made no findings and relied on the Trial Examiner's findings (he could not rely on the footnote No. 3, because that was not released for over 3 months later), we conclude that he likewise mis-interpreted the Trial Examiner's findings. Murdock was wrong in holding that

> "the union's discriminatory practices under . . . (the contract) are unlawful"

because there were no requisitions under the contract. Likewise Murdock's holding that the

> "discrimination as to Lewis"

violated the Act, since the only issue was discrimination under the contract with the AGC covering their affiliates only. His holding that "the coercion . . . (of) Lewis" was violative, was undobutedly derivitive, and since the discrimination finding fails, the derivitive perishes.

That leaves us with the Board's interpretation of Murdock's concurrence, (R. 46, footnote No. 2):

> "Member Murdock concurs in the finding of a violation with respect to Lewis for the reasons indicated in his attached opinion."

This is in error and a distortion of Murdock's position. Murdock vigorously opposed the Board's per se views. The Board's "implementation of the unlawful contract" is a *per se view,* which does violence to Murdock's views.

We believe that the General Counsel has correctly phrased not only what the Board and Murdock agree to, but what the Trial Examiner found (GC-Br. 10):

> "In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs."

But there, we part company, because the General Counsel argues (GC-Br. 5) that AGC-affiliates requisitioned employees through the hiring hall as a matter of fact. The Trial Examiner found that during the crucial period of Lewis' rejections employers were requisitioning help (R. 16) but not the affiliates of the AGC-Chapters (R. 33-34). The Board found that other employees were requisition-

ing help (footnote No. 3 SR 197; see this brief p. 12), and did not reverse the Trial Examiner on his other holding. In fact, the Board adopted it inferentially by stating that it was not necessary to consider the absence of such evidence of lack of requisitions (S. R. 197). We therefore do not agree with the General Counsel in his interpretation of the above quoted statement. We suggest that his interpretation, but not his statement, is in error.

No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER AND RESPONDENT,

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS, INC., THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., AND THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, RESPONDENTS AND PETITIONERS.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
and
CROSS-PETITION FOR REVIEW OF SAID ORDER

BRIEF OF RESPONDENTS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

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and
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BRIEF OF RESPONDENTS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC., and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER

I.

JURISDICTION

This matter is before the court, both upon the Board's petition for enforcement and the petition of the various respondents for a review of the Board's order. The jurisdiction of this court to review the order of the National Labor Relations Board is founded upon paragraph f. of section 160, Title 29, United States Code.

II.

ADDITIONAL STATEMENT OF THE CASE

These respondents, acting on behalf of their members in 1955 negotiated a contract on an industry-wide basis with the Western Washington District Council and local unions having jurisdiction in that territory of the International Hodcarriers, Building and Common Laborers of America acting on behalf of their members (Gen. Cou. Ex. 4). Subsequent to the negotiation of this contract, these respondents have had nothing to do with the hire, discharge or employment of men under the contract (R.90, R.93), and the managers of the chapters actually had no direct knowledge of what their members did with respect to the hiring of men (R.114-115). The AGC chapters had consistently advised their members that in the hiring of employees, they were not to discriminate with respect to whether a man was a member or non-member of a union (R. 81, 86, 88) and both chapters had issued bulletins to their members implementing this advice (Gen. Cou. Ex. 5 and Tacoma Chapter AGC, Ex. 1). None of the AGC chapters had ever advised their members that the contract obligated them to obtain their laborers exclusively from the union hiring hall (R-82, R-88-89). In fact, it was a matter of frequent occurrence for the members of the three AGC chapters to hire men directly without going through the union hiring hall (R-83, R-87, R-93, R-107). When inquiry has been made to the managers of the chapters as to whether an employer had to get union clearance before hiring a man, the employers have been consistently advised that they did not (R-86-87, R-93, R. 107-108).

The charging party, Cyrus Lewis, never made application for employment to any of the members of the AGC chapters (R. 78) and none of the members of the AGC chapters had refused to hire Cyrus Lewis (R. 84, R. 100, R. 91). There is no evidence that any complaint was ever made to the AGC chapters about any discrimination against Lewis nor was any such complaint made to any of the members of the chapters. Cyrus Lewis is a complete stranger to these respondents. The managers of the chapters had taken the view, and had so advised their members, that there was no obligation under the contract to clear through the union before hiring men off the street without the use of the union hiring hall. Thus, the manager of the Seattle Chapter testified (R. 87):

> "Answer—No, he asked me if he could do it without clearing the man through the union. I said: 'Under the law you can do it without clearing the man through the union.'" The manager of the Mountain Pacific Chapter testified (R. 107: "Answer—I will bet our members have hired 200 people this summer. I know of 50 students that were hired directly from the university, but for unskilled work. Question—Was this the subject matter of complaints that the union made to you? Answer—No, not at all."
>
> He went on to testify (R. 107): "Question—This group of people you speak about, did the union with respect to that group of people agree that they might be hired? Answer—It was just a courtesy to let them know what we were doing. Question—Did you get an agreement from them with respect to hiring or referral from the union? Answer—No. Question—Was there not an understanding reached between you and the union that no referral would be required with respect to these university students? Answer—Not with us there wasn't."

The jurisdiction of the Board was sought to be established solely by a showing that some members of the AGC chapters were engaged in commerce (SR. 212). There was no evidence or finding that any member engaged in commerce ever had any contact whatsoever with the charging party, Cyrus Lewis, or that Cyrus Lewis would have been referred to an employer engaged in commerce if the union had dispatched him. There was no evidence offered or admitted to the effect that members of the AGC chapters affected by the contract had any job openings that the charging party, Cyrus Lewis, failed to get by reason of the contract or even that the members of the AGC chapters were making any use of the hiring hall at the time of the application of Cyrus Lewis. This latter fact is expressly found by the trial examiner (R. 33) and that finding of fact is not set aside in the opinion of the Board. Counsel for the government conceded at the trial that no proof had been made that Lewis was kept from getting a job with any specific employer (SR. 224).

(a) *The Questions Involved in this Case are as follows*:

1. Can an association carrying on industry-wide bargaining on behalf of its members be held liable for an illegal application of the contract where neither it nor its members knew of or participated in the illegal application?

This question is raised in this case by the order of the Board finding these respondents liable for the union's failure to dispatch Cyrus Lewis for employment although no evidence was introduced to indicate any participation or knowledge of these facts by these respondents.

2. Can liability to a charging party be established without proof that the contract prevented him from obtaining any particular employment?

This question arises because of the Board order directing the payment of reparations by the AGC chapters, notwithstanding there was no testimony or proof that the charging party, Cyrus Lewis, was prevented from getting any available job with any members of the AGC chapters by reason of this contract.

3. Can jurisdiction of the National Labor Relations Board be established merely by showing that an association of employers has members engaged in commerce without any further showing that the members engaged in commerce were affected by the alleged unfair labor practice?

This question arises because jurisdiction of the National Labor Relations Board was sought to be established by the government solely upon the basis of proving that the Associated General Contractors chapters had members carrying on extensive commerce but no proof was adduced to show that the alleged unfair labor practice prevented the charging party from obtaining employment with any member engaged in commerce or that any member engaged in commerce was in any manner connected with the case of Cyrus Lewis.

4. Can an association of employers which negotiated a contract more than six months prior to the filing of the charge be held liable for maintaining, in effect, an illegal clause in the contract where they had consistently advised their members to interpret it in a legal manner?

This question arises because the Board found the AGC chapters liable solely because they had maintained the contract in effect whereas the undisputed testimony shows that they had nothing to do with the actual carrying out of the contract with respect to employment, but had consistently advised their members that the contract was to be interpreted as non-exclusive and non-discriminatory.

III.

SPECIFICATIONS OF ERRORS

The National Labor Relations Board erred in the following respects:

1. In holding that the AGC chapters are subject to the jurisdiction of the NLRB as an employer engaged in interstate commerce within the meaning of the National Labor Relations Act.

2. In finding that these respondents engaged in any unfair labor practice.

3. In not dismissing the action as to these respondents.

4. In making findings and conclusions not supported by the evidence.

IV.

ARGUMENT

In this case the court has before it a petition for enforcement filed by the National Labor Relations Board and also a petition to review filed on behalf of these respondents. The issues raised in the two petitions are identical and consequently we shall discuss these issues together.

(a) The Contract is not Per Se Illegal.

There is no evidence and no finding that the chapters of the Associated General Contractors partici-

pated in any way in the alleged mistreatment of Cyrus Lewis. The footnote to the order of the National Labor Relations Board (R. 46) states in part:

> "... our finding against the other respondents is limited to the maintenance of the hiring provisions of the contract rather than their execution."

The Board's decision insofar as it holds these resondents liable is based upon a determination that the contract itself, irrespective of how it is applied, is illegal and constitutes an unfair labor practice. The Board said in its opinion (SR 197):

> "We hold the hiring hall provisions of this contract to be unlawful. For the purpose of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegations and discriminatory practices in hiring."

In arriving at this conclusion, the Board set aside the recommended order of the trial examiner and reversed his findings and we submit disregarded the language of the contract itself. In its opinion the Board stated what is not true (S.R. 196):

> "The respondents do not, nor could they argue that this contract does not make employment conditional upon union approval, for a more complete and outright surrender of the normal management hiring prerogative to a union could hardly be phrased in contract language."

The foregoing language is neither supported by what the contract says nor by the evidence and certainly these respondents do argue that the contract does not make employment conditional upon union approval.

Section 6 of this contract contains no language providing that union members shall have any preference in employment. In this respect it is different from the contract that was before the court in the case of *NLRB vs. E. F. Shuck Construction Co., Inc., et al,* 243 F. (2d) 519. The contract in that case provided:

> "It is further agreed that all members of the party of the first part hiring employees will employ none other than members of the party of the second part. . ."

The contract in the Shuck case was the predecessor of the contract involved here and the provision for preferential hiring of union employees was pointedly omitted from the present contract.

Section 6 of the present contract does not bind the employer to *exclusive* use of the union hiring facilities. A critical inspection of the language of section 6 of the contract (Gen. Cou. Ex. 4) will show that in its paragraph (a) it places upon the union an obligation and a responsibility to recruit employees and maintain offices for the convenience of the employer and the need of employees. The language does not say that the employer may not hire its men elsewhere.

Paragraph (b) says that the employer will call upon the union for men but does not say that he may not obtain other men elsewhere.

Paragraph (c) is applicable only after the employer *has placed orders with the union* and in that case if the union cannot fill the order, the employer is relieved from any obligation to the union and may employ its men elsewhere. This is similar to a provision that might be in an arrangement with a private employment agency to provide that there would be no breach of contract if after order was

placed the agency, having been unable to fill it, the employer then sought its men elsewhere. This language does not bind the employer to wait 48 hours unless it has *actually placed orders* for men with the union.

Paragraph (d) of section 6 expressly recognizes the fact that the agreement has been made in recognition of the existing statutory restrictions on exclusive hiring through the union and provides for renegotiation of the contract in case the laws are changed. For convenience, we set out again the provisions of section 6 of the contract.

> "6. To maintain employment, to preserve workable labor relations, to proceed with private and public work, the following accepted prevailing practices shall continue to prevail in the hiring of workmen:
>
> "(a) The recruitment of employees shall be the responsibility of the union and it shall maintain offices or other designated facilities for the convenience of the Employers when in need of employees and for workmen when in search of employment.
>
> "(b) The Employers will call upon the Local Union in whose territory the work is to be accomplished to furnish qualified workmen in the classifications herein contained.
>
> "(c) Should a shortage of workmen exist and the Employer has placed orders for men with the Union, orally or written, and they cannot be supplied by the Union within forty-eight (48) hours, Saturdays, Sundays and holidays excluded, the Employer may procure workmen from other sources.
>
> "(d) Either party to this Agreement shall have the right to reopen negotiations pertaining to Union security by giving the other party thirty (30) days written notice, when there is reason to believe that the laws pertaining there-

to have been changed by Congressional Amendments, Court Decisions, or governmental regulations."

The language used in this section neither by its terms nor by the construction placed upon it by the parties who made it bars an employer from hiring men from any source the employer chooses to resort to. We make this statement in the light of the following considerations:

1. It was testified to without contradiction that the AGC chapters did not consider their members bound to the exclusive use of the union hiring facilities and their members did, in fact, when they saw fit hire men off the street without using those facilities. Thus (R. 107):

> "Question—As a matter of fact do not your employer members seek to get whatever work force they need through the hiring hall? They don't hire off the banks and practice, do they?
>
> Answer—I will bet our members have hired 200 people this summer. I know of 50 students that were hired directly from the university but for unskilled work."

That was the testimony of the manager of the Mountain Pacific Chapter. The manager of the Seattle Chapter said: (R. 87):

> "Answer:—What I said was that he called me and asked me if he could employ a student as a common labor on his job for a period of two weeks during spring vacation. Question—You told him he could? Answer—Yes, I told him he could. Question—That was the extent of the advice you gave him? Answer—No, he asked me if he could do it without clearing the man through the union. I said under the law you can do it without clearing the man through the union."

The manager of the Tacoma Chapter testified (R. 88):

> "Question—Do all of your members obtain all of their laborers in accordance with section 6 of this agreement by recruiting their people through the union? Answer—No. Question—to what extent do they not? Answer—Since my short time in Tacoma I believe that there was only once that some union representative objected about a particular contractor because he was hiring men off the street. That is the term that was used and that is the only case I recall. Question—Do you undertake to enforce or advise—did you undertake to advise your members that they must comply? Answer—No, I didn't."

2. In actual practice the language was not interpreted by the AGC chapters as binding their members to exclusive use of the union for obtaining workmen.

We make the statement that the contract did not bind the AGC chapters or their members to an exclusive arrangement for the further reason that if the language was susceptible to that interpretation, it was, if the decision of the board in this case is correct, illegal and to that extent was unenforceable and void. The chapters always took the view that there was no enforceable obligation for them to hire exclusively through the union.

It is fundamental law that an illegal contract is not a binding obligation on the parties, 12 Am. Jur. 641, *William Lindke Land Co. vs Kalman* (Minn. 252 N.W. 650, 93 A.L.R. 1393); U. S. vs. *Trans-Missouri Freight Association,* 166 U. S. 290, 41 Law. Ed. 1007; Am. Jur. states the rule:

> "It is a general rule that an agreement which violates a provision of a constitution or of a

constitutional statute or which cannot be performed without violation of such a provision is illegal and void."

12 Am. Jur., Contracts, 652. See also *Ewert vs. Blue-Jacket,* 259 U.S. 129, 66 Law Ed. 858. *Connolly vs. Union Sewer Pipe Co.,* 184 U.S. 540, 46 Law Ed. 679; *Burck vs. Taylor,* 152 U.S. 634, 38 Law Ed. 578.

The parties to this case knew that section 6 of the contract could not be enforced as an obligation to use the union hiring facilities exclusively and the Tacoma Chapter so informed its members. In a bulletin dated June 26, 1956, (Tacoma AGC Ex. 1) wherein they stated:

> "The NLRB's recommended order to the union and the AGC chapters states that 'we will not maintain, give effect to, renew or enforce any union security provisions in any agreement with the International Hodcarriers and Common Laborers Union of America. . . which requires job applicants to be cleared or approved by any labor organization except as authorized by section 8 (a) (3) of the act (Taft-Hartley). Among others paragraph 6, section B of our contract which states that the employers will call upon the local union for their workmen, in particular, has been ruled illegal and members should be very cautious in their hiring of men to be sure that the law is not being violated."

The known, unenforceable character of an exclusive hiring provision was taken into consideration by the manager of the Seattle Chapter in advising his members that they did not have to go through the union in doing their hiring (R. 83), and by the manager of the Mountain Pacific Chapter when he stated (R. 107):

> ". . .then we call on them because they have the men, not because we have to go through

them, but because they are the only source of information that we have available."

Thus, paragraph 6 of the contract did not bind the employers to exclusive resort to the union as a source of its men either by the terms of the language used, the interpretation put upon it by the parties to it, or by its legal implication. Legally that section would have been absolutely unenforceable if any attempt had been made to require the employers to resort solely to the union for their men since the section as so interpreted was illegal under the Taft-Hartley Act if the decision of the National Labor Relations Board in this case is correct.

There is nothing in the National Labor Relations Act which prohibits an employer from hiring a union man, or a non-union for that matter, and there is nothing in the Act which prohibits the employer from asking the union to refer to him a man. There is nothing in this contract that excludes the employer from rejecting the man sent by the union if the employer does not consider him desirable, and so long as the employer has the right to use or not use the union dispatching facilities, there has been no abdication of any of the functions of the employer in hiring. That is the case here.

Section 6 of the agreement merely recognizes what every one knows, namely, that the union is a ready source of qualified men and the employer can save the trouble of searching for such men by calling on the union when he needs men. The provision in a contract that the union shall maintain a hiring hall and shall make it available for the convenience of the employer violates no portion of the National Labor Relations Act. There is nothing per se illegal in this contract. The contract could become illegal only if a situation existed which was

not established in this case, namely, that the employer had surrendered his right to select the persons who would be employed by him. The use of the union hiring facilities has been sustained by the courts many times. *Eichleay Corp. vs. NLRB,* 206 F. (2d) 799. *Del E. Webb Construction Co. vs. NLRB,* 196 F. (2d) 841. *NLRB vs. Swinerton,* 202 F. (2d) 511.

This contract, neither by its language nor by the construction which these parties gave it, ever ousted the employer of the right to do his own hiring and hence there was nothing illegal in it.

(b) The Board's Decision With Respect to the AGC Chapters is Based Upon Speculation and Assumption Contrary to the Evidence.

The legal principle of burden of the proof is applicable to proceedings before the National Labor Relations Board as well as to any ordinary legal proceeding. Insofar as the AGC chapters are concerned, proof of the Board's contentions was wholly lacking. The key to the Board's decision insofar as the AGC chapters are concerned will be found in the following quotation from the Board's opinion (S.R. 207):

> "As an old-time member of the Union, and aware of the established hiring hall arrangement, Lewis, of course, went to the Union to apply for work. Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance, for that is precisely what the contract obligated each employer to do. It matters not, therefore, which of the two parties to the illegal contract he first approached. His unlawful exclusion from employment was a joint act by both Respondents. It is equally immaterial that there is no evi-

> dence now before us that on the particular days when he was rejected there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract."

The Board's assumption that had Lewis gone directly to one of the Respondents Employers he would have unquestionably been rejected summarily and referred to the union for clearance, is drawn out of thin air. There is no evidence that Lewis ever applied to any member of the AGC chapters (R. 79). There is absolutely no evidence upon which the assumption is based. The evidence is, however, uncontradicted that the members of the AGC did on many occasions hire persons direct and without any clearance from the union (R. 87, R. 93, R. 107).

We deem it an important factor in this case that Lewis *never made application* to any AGC member and *was never rejected* for employment. The current contract, as we have pointed out previously, had been expressly changed to eliminate any requirement that the employers hire union men exclusively. If Lewis assumed that he could not be hired by an employer to whom he applied directly, there was no basis for such assumption, either in the contract or in the practice of the parties, insofar as any evidence introduced in this case shows.

The finding by the Board that Lewis' application would have been summarily rejected must be based upon something more substantial than conjecture. *NLRB vs. Englander,* 260 F (2d) 67, 73. Without the assumption the government's whole case falls since it must depend upon the maintenance by these respondents of a contract which had the effect of discriminating against Lewis for lack of union membership. The chapters cannot be found guilty

on mere suspicion. A provision in the contract which the AGC chapters did not consider as binding them to exclusive use of the union facilities which would, under the decision of the National Labor Relations Board in this case have been void and unenforceable was in itself not sufficient to prove that its mere existence prevented Lewis from getting employment from the members of the AGC in the light of the fact that *he never tried* to obtain such employment direct from the members.

(c) There was no Proof that the Alleged Illegal Contract Provision was the Cause of a Discrimination Against Lewis.

The Board seeks to hold the AGC chapters financially liable to Lewis for his failure to obtain employment. The doctrine of proximate cause is as applicable to this case as to any other. The government wholly failed to show that Lewis would have obtained any employment from the members of the AGC chapters even if the provisions of section 6 of the contract had not been there or had been carried out in another or a non-discriminatory manner. As the examiner pointed out in his decision, there was not even any proof that any jobs were available from these respondents' members during the time that Lewis claims that he was discriminated against. In the absence of proof that he lost something, the AGC chapters cannot be held liable to reimburse him for that which it is not shown he would have had anyway.

The examiner found (R. 35):

> "There is no doubt, as pointed out earlier, that Local 242 discriminated against Lewis, but there can be no finding that it discriminatorily exercised the authority delegated to it by mem-

> bers of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242, the agency through which Lewis sought job referrals. The critical fact is that there is no such evidence, and however one may condemn the treatment accorded Lewis by Local 242, and desire to do him moral justice, one must not blind himself to deficiencies in the evidence."

The examiner, who was reversed by the Board but not with respect to this finding said (R. 33):

> "The heart of the matter is that there is no evidence in the record that any member of any of the AGC Chapters sought or requisitioned any labor at or through the office of Local 242 at any time since the effective date of the contract. Moral convictions that such requisitions were made will not suffice, for they are no substitute for evidence."

No court should sustain a judgment for a substantial amount of money without some proof of the facts which create the liability. There is no showing here that Lewis failed to get any job that might have been made available had other provisions in the contract existed nor is there any showing that he could not have been hired had he made application direct to the members of the AGC. There has been a total failure of proof. The matters that we are now discussing are not mere technical objections to the proceedings in this case—they are matters of substance.

This is a situation in which the charging party is a complete stranger to the respondents and their members. It is useless to speculate as to what would have happened had he applied to the members of these respondents or complained to them about the

treatment that he got from the union. If the rules of burden of the proof mean anything and if the rules of proximate cause mean anything, the Board's case has wholly failed here.

(d) Liability of These Respondents is Barred by Limitation.

No evidence was introduced that these respondents did anything with respect to the contract after its negotiation. The basis for liability of these respondents is stated in the Decision and Order paragraph (2) (R. 45) as follows:

> ". . .we conclude that the respondent-employers have violated section 8 (a) (3) and (1) of the act. . . by executing and maintaining in effect the hiring provisions of their contract."

In the footnote to the order (R. 45) the Board says:

> "As only the charge against respondent Local 242 was filed within six months of the execution of the contract in question, our finding against the other respondents is limited to the maintenand of the hiring provisions of the contract rather than their execution."

Section 10 (b) of the National Labor Relations Act (29 USC 160) provides in part:

> "Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made. . ."

Since the liability in this case is based solely upon the maintenance of the contract in effect, we submit that it was incumbent upon the government to prove that these respondents in the six months preceding the filing of the charge undertook to so

maintain the contract in effect that it gave the exclusive control of hiring to the unions. The government did not do this, but the witnesses that they produced to attempt to establish such fact, namely, the three AGC managers, all testified not only that they had not under taken to enforce exclusive hiring through the union but that they had advised their members that it was not necessary to go through the union. (R. 88 to 91, Tacoma Chapter's Ex. 1, R. 90, R. 107).

Surely the continued disclaimer of any obligation on the part of the members to clear through the union cannot be held to constitute the keeping of the portion of the contract complained of in effect, at least insofar as the construction that the government tries to put on that portion is concerned. These AGC chapters did nothing within six months before the filing of the charge which constituted an unfair labor practice.

(e) The National Labor Relations Board Had No Jurisdiction Over These Respondents.

In order for the National Labor Relations Board to have jurisdiction there must be an unfair labor practice affecting commerce. This is the requirement of Section 10 (a) of the Act (USC Title 29, Sec. 60). The opening sentence of that section reads:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice listed in section 8 affecting commerce. . ."

There is no evidence to sustain any finding that commerce was involved here. No showing was made that the corporate entities constituting the AGC chapters themselves hired, would have hired, or would have had anything to do with the hiring of

Cyrus Lewis no matter how his applications had been handled. There is no evidence to indicate whether if Cyrus Lewis had been referred to a job, it would have been with an employer engaged in interstate commerce *or would have been employment affecting commerce.*

The evidence was clear that the AGC chapters themselves did not do any of the things which are normally criteria for being engaged in commerce. Thus, they neither hire nor pay anyone (R. 82); they do not take construction contracts (R. 82); they do not purchase materials received in commerce (R. 82). The sole basis for holding that commerce was affected here was by establishing that some members of the AGC chapters did work in commerce. On the same basis, every Chamber of Commerce, every commercial club, and every business association is subject to the National Labor Relations Act. We believe that the law is not susceptible to this type of construction. It is sought here to hold the chapters themselves, which are corporate entities separate from their members, financially liable for recompensing Lewis for the loss of work that it has not been proven ever existed, upon the basis of the involvement in commerce of some members of the AGC chapters but who were not shown to have had even a remote or potential association with Lewis. In other words, there has absolutely been no showing that Lewis was in commerce, that his employment was in commerce, or that the failure of the union to dispatch him had any effect whatsoever on commerce. Here again is a failure of proof. No case of jurisdiction has been established.

For all that appears in the record Lewis might have worked all his life in jobs not affecting com-

merce and if he had been dispatched he might not ever have been referred to any employer engaged in commerce. Certainly his failure to be dispatched had no effect upon the AGC chapters themselves since they were not employing any person in commerce and would not have employed Lewis anyway because he was not the type of person that the chapters employed. Jurisdiction of the National Labor Relations Board may not be established by mere speculation.

(f) The Order of the National Labor Relations Board is Contrary to Law.

Aside from the consideration which we have already discussed as to the justification of any finding against these respondents the order of the National Labor Relations Board is too broad. It does not merely enjoin them from maintaining in effect that portion of the contract about which complaint is made, but undertakes to go much further. Paragraph (2) of the order (R. 48) says that the AGC chapters shall cease and desist from:

> "In any like or related manner encouraging membership in the Respondent Unions, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act."

There is nothing in the record to indicate that these respondents are about to interfere with, restrain or coerce employees in the exercise of any rights guaranteed in Section 7 of the Act, nor is there anything to indicate that these respondents in respect to any other labor organizations are about to do this. The proposed order is much too broad. The

Supreme Court of the United States and this court have both heretofore indicated that an order of enforcement should not be entered beyond the scope of the matter adjudicated. A case directly in point is *National Labor Relations Board vs. Express Publishing Co.,* 312 U.S. 426, 85 Law Ed. 930. In that case the National Labor Relations Board proposed an order beyond the scope of the matter at issue. The court in holding the order improper said:

> "The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondents would engage in any or all of the numerous unfair labor practices defined in the act."

The same thing may be said in this case. There is no finding by the Board that the AGC chapters are about to interfere, restrain or coerce employees from either this union or any other union in the exercise of the rights guaranteed them under Section 7 of the Act. The United States Supreme Court in the above case went on to say:

> "In view of the authority given the Board by section 10 (c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and the broad language of section 10 (e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make, or the court should enforce, orders which could not appropriately be made in judicial proceedings. This is the more so because section 10 (a) which authorizes the Board 'as hereinafter provided to prevent any person from engaging in any unfair labor practice,' specifically directs that 'this power shall be exclusive

> and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' In the light of these provisions we think that Congress did not contemplate that the courts should by contempt proceedings try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found."

It will be noted that the Supreme Court specifically held that the decree should not include a restrainer as to *violations not found* by the Board. The court also held that the mere fact that one violation has been found does not justify an injunction just broadly stating that the respondents shall obey the statute. The court said:

> ". . .The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which the defendant has committed."

In the case just cited, the court refused to grant a broad order generally requiring the compliance with the National Labor Relations Act where there was no finding to justify any indication that other and different kinds of violations would occur. It is clear from the foregoing citation that the Supreme Court of the United States has specifically approved the authority of the courts to review and

limit enforcement decrees to keep them within the bounds of the issues and the findings. This court itself has recognized that it has a duty to see that the enforcement orders are not too broad to be sustained by the issues before the court.

In the case of *National Labor Relations Board vs. Mason Mfg. Co.,* (9CCA 1942) 126 F. (2d) 810, this court said:

> "The court believes it should exercise great care in entering general cease and desist decrees in such cases as these whereby a single mistaken act on the part of the employer would on the face of the decree transfer from the experience, skill and knowledge of the board future claims of violation of the Act affecting some entirely different labor organization in an entirely different way, and place their determination in contempt proceedings in the more restricted area of evidence of court procedure."

The only issue in this case was whether the maintenance of Section 6 of the contract constituted an unfair labor practice. There is no finding, and there is no evidence, to indicate any threat of any interference, restraint or coercion of employees, and it would be improper to include in any enforcement order, any restraint which would result in punishment as for contempt of court of these respondents in the case of any future alleged interference, restraint or coercion of employees.

Respectfully submitted,

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NO. 15966

In The United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, *Respondents;*

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *Intervenor.*

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief for The Building and Construction Trades Department (AFL-CIO), Intervenor

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NO. 15966

National Labor Relations Board, *Petitioner*

v.

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Building and Construction Trades Department, AFL-CIO, *Intervenor.*

On Petition for Enforcement of An Order of The National Labor Relations Board

BRIEF FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT (AFL-CIO), Intervenor

Order Allowing Intervention

The Building and Construction Trades Department (AFL-CIO) is a labor organization chartered by the American Federation of Labor in 1908. The Department is composed of eighteen (18) national and international building and construction trades unions, including the International Hodcarriers, Building and Common Laborers' Union of America, having a membership of more than three million

employees in the building and construction industry. Upon a motion of the Department for leave to intervene, filed under Rule 34, which had been consented to by all parties in this case, this Court issued its order on December 10, 1958, allowing the intervention.

Statement of the Case

In accordance with the provisions of paragraph 3 of Rule 18 of the Court, Intervenor wishes to note that Petitioner's "Statement of the Case" in its brief omits any statement of the Trial Examiner stage of this proceeding. In particular, Petitioner's Brief fails to state the conclusions of the Trial Examiner that the contract provisions in issue in this case are not illegal on their face. The pertinent sentence in the Trial Examiner's Intermediate Report and Recommended Order reads as follows:

> "Hence, I do not agree that the provisions of Section 6 of the Agreement between the A.G.C. Chapters and the District Council are invalid per se, and I find that by the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." (R.30)

The Trial Examiner stated his basic reason for the above conclusion as follows:

> "Bearing in mind such factors of industrial and economic convenience and necessity, I can see no basis for a presumption that a 'bare provision' delegating to a union the responsibility for the recruitment of labor in the terms expressed in Section 6 [of the Agreement] 'is intended to, and in fact will, be used' to encourage union membership. One could with at least equal logic, I think, presume that the purpose of such a provision, standing above, [alone], is to meet the industrial and economic convenience and necessities of employers and those seeking employment. Upon close scrutiny of the General Counsel's position, what it implies is that one should indulge a presumption from the naked provisions of Section 6, alone, that the parties thereto intend to, and will, use them for unlawful purposes, despite

> the fact that they may also be used for the lawful purpose of furnishing employers with an advantageous source for the supply of labor, and jobseekers with a convenient method of securing work. The adoption of such a doctrine would, in my judgment, run counter to traditional and elementary legal concepts." (R. 28-29).

The Intervenor also wishes to controvert Petitioner's statement of the rule established by the Board in this case. Petitioner's brief (pp. 12-13) states that:

> The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful. Where it can be shown that employees may reasonably expect that referrals to jobs will be made without regard to whether they are union members or comply with union policies, there is no premise for an inference of unlawful encouragement of union membership. Accordingly, it is entirely possible for parties to hiring agreements to take appropriate steps, which are indicated in the Board's decision, in order to neutralize the improper effects the enforcement of their agreement otherwise might have on job applicants, and thereby avoid illegality altogether."

The Board did not state its position in its decision as described above. Rather, the Board laid down a hard and fast rule which must be complied with by all parties to union hiring hall arrangements, to satisfy the Board's concept of legality, and the rule includes specific provisions which must be written into collective bargaining agreements. The pertinent language of the Board in its decision reads as follows:

> "We believe, however, that the inherent and unlawful enforcement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face, *only* if the agreement *explicitly* provided that:
>
> "(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or

any other aspects or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union.

"(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." (Italics supplied). (R.202-203).

The concluding paragraph of section 2 of the Board's decision makes it clear that it found that the execution and maintenance of hiring provisions of the contract violates Section 8 (a) and (3) and (1) and Section 8 (b) (2) and 1 (A) of the Act because the contract did not contain any of the above safeguards. (R. 205).

If there were any doubt as to the matter, it is entirely resolved by the subsequent decisions of the Board.

In *K. M. & M. Construction Co.*, 120 NLRB No. 140, 42 LRRM 1104 (*May 22, 1958*), a hiring arrangement which reserved to the Employer the right to reject applicants was held to be in violation of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act because it did not contain the two other criteria announced by the Board in its *Mountain Pacific* decision (*March 27, 1958*). The Trial Examiner, in the *K. M. and M. Construction Co.* case had found the agreement in violation of the Act but the Board preferred to base its decision on the *Mountain Pacific* rule:

> "While we agree with his conclusion, we do not herein adopt his reasoning but rely upon our recent decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.* etc., 119 NLRB No. 126, 41 LRRM 1460, and the rationale therein. That case laid down three criteria which, if met *fully* and *in toto* would save such an exclusive arrangement from the interdiction of the Act. Though the clause in question in the instant case met one of the three criteria—the reservation to the employer of the right of rejection of any person re-

> ferred by the Union—it failed to meet the other two criteria. It therefore did not meet all of the criteria required and is *ipso facto* invalid and in violation of the Act. We so find."

In the case of *E. & B. Brewing Co.,* 122 NLRB No. 50, 43 LRRM 1128, (December 9, 1958), the Board has unmistakably interpreted its decision in the *Mountain Pacific* case as having the effect of a rule or regulation. In this case the parties had agreed to two of the criteria later set forth in *Mountain Pacific* but had omitted to included a posting provision (their agreement having been made prior to the announcement of the rule). The Board held the agreement unlawful:

> "After the issuance of the Intermediate Report, however, the Board issued its opinion in Mountain Pacific Chapter of the Associated General Contractors, Inc. et al., 119 NLRB No. 126-A, 41 LRRM 1460, reversing a similar conclusion of another Trial examiner and holding that an exclusive hiring-hall contract was unlawful unless it explicitly provided for three safeguards, including a requirement that the contracting parties duly post all provisions relating to the functioning of the hiring arrangement. The contract in this case contained no such safeguard, at [as] the Union concedes. But the Union argues that the basic rules of due process preclude the so-called retroactive application of such a requirement. We find no merit in this argument.[1]
>
> [1] See the *Mountain Pacific* case, supra."

The footnote makes it clear that the foregoing ruling is the ruling of the *Mountain Pacific* case, even to the extent that there the Board was in fact applying its rule retroactively.

In the controverting of Petitioner's Statement of the Case, Intervenor deems it necessary to bring to the attention of this Court the decision of the Board in the case of *Brown-Olds Plumbing and Heating Corporation,* 115 NLRB 594. Under the doctrine of this case, which is being applied, hiring arrangements deemed illegal by the board subject employer and union alike to penalties, including the reimbursement to all employees subject to such hiring arrange-

ments of all dues, fees and other charges paid to the union by such employees (including members of the union) for the period commencing with the day six months prior to the filing of the unfair labor practice charge.

The current effect of the *Mountain Pacific* and *Brown-Olds* decisions on employers and employees in the building and construction industry may be ascertained from the large scale revision of agreements and practices which has been undertaken. 1 Labor Rel. Rep. 9-10 (1958); Id. 261. See Affidavit of Richard J. Gray submitted in support of Motion to Intervene in the instant case.

It is respectfully submitted that the definition of the questions in this case depends in part upon the proper characterization of the Board's decision. It is the view of the Intervenor that since substance, rather than form, governs (*NLRB* v. *Guy F. Atkinson Co.,* 195 F. 2d, 141) the Board's *Mountain Pacific* rule accompanied by its present legal effect on many parties in this and other industries is a rule or regulation having the force of substantive law.

As the Supreme Court has said in *Columbia Broadcasting Co.* v. *United States,* 316 U.S. 407 (1942):

> ". . . a valid exercise of the rule-making power . . . sets a standard of conduct for all to whom its terms apply . . . It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails . . .
>
> "Such regulations have the force of law . . ." (at p. 418)

In that case, the issue was judicial reviewability of the announcement of a rule of the Federal Communications Commission stating the types of provisions in agreements between networks and their affiliates which would be grounds for refusal to renew licenses in future licensing proceedings. The Commission characterized its statement as "no more reviewable than a press release" (at p. 422). The Court disagreed because the present effect of the announced policy was to cause cancellations and threats of

cancellation of agreements between C.B.S. and other stations. The Supreme Court stated:

> "The regulations are not any the less reviewable because their promulgation did not operate of its own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees and appellant with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty." (at p. 418)

And elsewhere:

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional cases by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."
> (at p. 425)

In the *C.B.S.* case the issue was judicial reviewability, here the question is whether the *Mountain Pacific* rule should be deemed a substantive rule or regulation which is to be judged as such. It is submitted that the same considerations which were deemed to establish the status of the rule in the *C.B.S.* case as reviewable are sufficient to establish the status of the *Mountain Pacific* rule as that of a rule or regulation having the effect of substantive law.

The language of the Supreme Court is applicable here:

> "The particular label placed on it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." (at p. 416)[1]

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[1] The Court in the instant case is faced with an instance of the exercise of the machinery of adjudication for rule-making purposes. Herein we have the other side of the coin from that presented in *Philadelphia Co. v. S.E.C.*, 164 F 2d 889 (C.A.3, cert. denied 333 U.S. 828). There, as the Court observed in *NLRB v. Guy F.*

SUMMARY OF ARGUMENT

The Board did not act in accordance with law in finding that the exclusive hiring agreement in this case is unlawful under Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act.

It is apparent that the hiring provisions of this particular agreement were not unlawful on their face. Nevertheless, the Board found that the hiring hall provisions of the written contract were unlawful apart from all other evidence in the case.

There is no provision in the Act prohibiting union hiring halls as such. The legislative history of the Act shows that Congress did not intend that the Act should be construed to abolish the institution of union hiring halls as distinguished from closed shop practices or other illegal preferences in employment based upon union membership. Nor was the Board given administrative power or discretion to do so.

Where there is an otherwise lawful union hiring hall contract, the Board's power is limited to finding whether the evidence shows that the administration of the hiring hall in the particular case is unlawful. The Board cannot create for itself a power to abolish all union hiring halls in each enterprise of every industry in the United States where labor and management agree to the establishment of such hall *unless* the parties conform to the specific conditions promulgated by the Board, including the writing of specific clauses into the collective bargaining agreement and their taking the affirmative action of posting the "safe-guards" deemed "essential" by the Board.

Atkinson, 195 F. 2d 141 (C.A.9, 1952), action of the Commission labelled as a rule and promulgated by rule-making proceedings was held in view of its actual operation to be an adjudication or order. The key to the Court's decision lay in the fact that the rule though phrased in general, legislative-like terms concededly had application only to the petitioner and applied specifically to affect existing rights of the particular person.

The Board is an administrative agency which does not possess the power to enact legislation. Nor can the Board accomplish such legislative object by indirect means.

The Board is not empowered to adjudicate an entire class of cases in the adjudication of a particular case. *Office Employees Int'l Union* v. NLRB, 353 U.S. 313; *Hotel Workers* v. *Leedom,* 358 U.S. 99, 27 LW 4022. The Board has sought to do so by ruling in the instant case that all union hiring hall contracts in any enterprise of every industry in the United States, where labor and management choose to provide for such halls in their collective bargaining agreements, are unlawful *unless* they conform to the explicit conditions promulgated by the Board.

The Board has made an *ad hoc* adjudication in the instant case in form only. In substance it has issued a rule or regulation having the force and effect of law. The rule of the *Mountain Pacific* case commands all affected parties in the building and construction industry to take affirmative action in compliance with the substantive requirements of the rule. Parties failing to comply with this command are subject to penalties, including the *Brown-Olds* remedy which requires the employer and the union to reimburse all employees covered by the prohibited union hiring hall contract for all dues, fees and other charges paid to the union for the period dating back six months prior to the filing of the unfair labor practice charge.

The promulgation of this particular rule is beyond the power of the Board (whatever its administrative power may be to issue substantive rules and regulations under Section 6) because it is in conflict with the intent of Congress. In any event, the Board has not followed the procedural requirements for notice and an opportunity to express views on proposed rules as prescribed by the Administrative Procedure Act. And the retroactive application of the *Mountain Pacific* rule to the parties in this and other cases is arbitrary and capricious.

The Board has assumed "a roving commission to inquire into evils and upon discovery correct them" which is not warranted under our legal system. *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495, 551.

ARGUMENT

I. Congress Did Not Intend to Abolish the Union Hiring Hall as an Economic Institution in the Building and Construction Industry, the Maritime Industry or Other Industries. Congress Intended to Make Unlawful in all Hiring Systems Preference in Employment Based Solely on Union Membership.

It is apparent that the Act contains no language which expressly abolishes the union hiring hall or which establishes the conditions under which such halls shall be established or which delegates power to the National Labor Relations Board either to abolish such halls or to formulate the conditions under which such halls shall be established subject to appropriate legislative standards.

The general language of Section 8 (a) (3) and (1) and Section 8 (b) (1) (A) and (2) are relied upon by the Board to support its assumption of power in this case.

The Board has sought, in this case, to abolish all union hiring halls as such, *unless* the halls are established under the conditions promulgated by the Board and it has, in effect, issued rules and regulations prescribing the *only* basis upon which such halls may be lawfully established.

In doing so, the Board has ignored the legislative history of the Act which shows that Congress intended to make unlawful preference in employment based on union membership in all hiring systems, without affecting the legal validity of the union hiring hall as such.

As Senator Taft has said:

> "In order to make clear the real intention of Congress, it should be clearly stated that *the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment*

agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .

* * * * * * * * *

"The majority report proceeds upon the erroneous assumption that . . . maritime unions cannot continue to have hiring halls . . . *The National Labor Relations Board and the courts did not find hiring halls as such illegal but merely certain practices under them. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, so long as they are not so operated as to create a closed shop . . .*" S. Rept. 1827, 81st Cong. 2d Sess. pp. 13, 14. (Emphasis added).

The above statement was made after the enactment of the Taft-Hartley Act. A statement to similar effect was made, however, by Senator Taft during the course of debate on this Act:

"As a matter of fact, most of the so-called closed shops in the United States are union shops; there are not very many closed shops. *If* in a few rare cases *the employer wants to use the union as an employment agency, he may do so.* But he cannot make a contract in advance that he will only take the men recommended by the union." (2 *Leg. Hist.,* LMRA 1010) (Emphasis added).

It is true, of course, that an administrative agency such as the Board can change its interpretation of the Act which it administers but it is worthy of note that the Board adhered to the above interpretation of the Act for many years preceding its decision in *Mountain Pacific.* See *Hunkin-Conkey Construction Co.,* 95 NLRB 433 and cases there cited.

It should also be noted that when Congress intended to accomplish a flat prohibition of a practice it knew how to select words which would effectively convey that meaning. See Section 8 (b) (4) (A) which makes it an unfair labor practice to engage in certain labor activity "where an ob-

ject thereof is: (A) forcing or requiring any . . . person to cease doing business with any other person . . ." Senator Taft, in that connection, made it clear that there was no intention to distinguish between "good" and "bad" secondary boycotts; the language prohibited all secondary boycotts. (2 Legis. Hist. 1106).

Congress also was able to find explicit words showing its intention to have substantive rules and regulations promulgated by the Board where it wished to do so. Thus, section 8 (a) (2) provides that it shall be an unfair labor practice for an employer

> "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided,* That *subject to rules and regulations made and published by the Board pursuant to section 6,* an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." (Italics supplied).

It is, of course, understandable that Congress would not have wished to destroy the union hiring hall in the building and construction industry, the maritime industry and other industries. The union hiring hall is a part of the system of production in these industries.

Economic facts caused the establishment of the union hiring hall in the building and construction industry long before the enactment of the Taft-Hartley Act.

On October 26, 1949, the construction employer representative serving on the Joint Board for the Settlement of Jurisdictional Disputes made a statement to the National Labor Relations Board which set forth the applicable economic facts of the industry. These employer representatives described construction employment procedure in the construction industry as follows:

1. Each employer constructs on numerous separate projects in each year.

2. Until a project is started he has no manual "employees."
3. On each project there are usually several "employers" frequently using different crafts of workmen.
4. On each project there is a constant shifting of crews on and off the job as the work progresses.
5. In each crew there are frequent changes in the men when the crew returns to the job.
6. There is not a time on the job when all men and all crews eventually employed will be so employed at the same time.
7. The workmen are drawn from an "area pool" of available workmen who will work for many or all employers in the area, or may drift from one area pool to another area pool.
8. When a workman's function on a job is temporarily or permanently finished they [*sic*] are laid off and returned to the pool for use on other jobs or by other construction employers.
9. A vast number of projects in the industry are of but a few days' or hours' duration for a given craft.
10. This quick need and rapid shifting of men in and out of the pool to various projects requires a previously established and uniform understanding of employment terms for all jobs and for all contractors in order to avoid delays in hiring and misunderstandings as to the terms of employment.
11. Each employer's policy as to wages and working conditions must be comparable to that of other employers of the men in the pool.[2]

The employer representatives described the customary hiring practices in the construction industry as follows:

> It has been the traditional custom in the Construction Industry, whether or not the workmen were union

[2] Hearings on S. 1973 Before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess. 155 (1951).

members, for the employer to have the right to select the workmen best suited for the work to be done.

It was his traditional custom in selecting men to consider necessary qualifications, such as—

A. Basic training for the work: For quality of work and good production he must be assured that he has had sound basic training.

B. Experience: He should have had experience in performing that kind of function, on that kind of construction, and with similar contractors and other crews.

C. Skill: He should have a degree of skill such as has been required by other contractors for similar work.

D. Safety training: He should have worked where proper precautions against accidents are taken and safety practices have been recognized—otherwise he will endanger himself and the safety and morale of the entire working force.

E. Cooperation: He should be cooperative in his attitude to the other workmen on other trades on the job.

F. Permanent connections: It must be possible to locate him on such short notice for employment and after employment:

G. Character reference: In many operations reputation for good character is essential.

It is obvious that the quick need for workmen in construction makes the use of men not previously employed by this management frequent. *It is likewise obvious that some agency would be used which could identify men of the qualifications required except in the few cases where the operations were so limited as to require only a small standard crew constantly performing similar work.* (Emphasis added.)

It has been the custom in many communities where union men are employed to measure these qualifications to large degree by the workman's ability to hold a membership in a union. *Under many circumstances the union did function as the only recruiting agency which*

could obtain quickly the qualified men required by the employer. (Emphasis added.)

The use of employment agencies—At one time in some areas the employers of non-union construction workers found it necessary to recruit through an employment agency to find the qualified workers needed.

The service of furnishing contractors qualified and trained workmen—The function of training and recruiting qualified men for an area pool, and identifying the qualifications for certain work, is a most important service to the employer.

The selection of workmen because of their qualifications should not be construed as unfair discrimation —The men are generally selected for their qualifications, not for the kind of card they carry, or the absence of one. If, however, the selection of a workman solely because he can furnish evidence of training, experience, skill, safety training, cooperation, permanent connections, and character references—in a given community by virtue of being a member of a given union which can vouch for these qualifications—in place of some workmen without substantiated evidence of such qualifications for the work to be performed, then the employer's choice must not be regarded as discrimination in favor of union membership and he must not be deprived of the right to use his own criteria in judging the qualifications. To do otherwise will destroy the production, quality, and efficiency of construction operations.

The construction employer should not be deprived of his right to select his source of labor supply, just as he selects his source of the various materials without charges of discrimination unless it is shown that the intent was to discriminate for or against membership in a certain union.[3]

A representative of a large construction company has testified before a Senate committee to the value of the union as a recruiting agency from the employer's point of view in the following language:

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[3] Id. at 158-59.

> As you will note by a study of our agreements, basically they all provide that the contractor has freedom of selection, so that when the men are sent to him he has control of how long they stay on the job. He can pick the men he wants.
>
> But the manner of bringing the men in, certifying as to their qualifications, and bringing them to the job generally is best handled by the representatives of the workmen themselves.[4]

The economic facts and the experience with respect to hiring halls in the maritime industry are set forth in J. P. Goldberg's "The Maritime Story," Harvard University Press, 1957, pp. 277-282.

The legislative history of the Act tends to show that Congress intended that the Board should administer the applicable provisions of the Act on a case-by-case basis with respect to hiring practices in union hall cases and to patently illegal preferential provisions in the documents establishing the hiring hall.

In the instant case, however, the Board has promulgated rules and regulations directing labor and management how to formulate the documents establishing the hiring hall and assessing penalties for failure to comply with such directions apart from any evidence of unlawful discrimination. The status of Respondent Council clearly demonstrates that this is the legal issue in the case. Council executed the agreement (which is not cognizable by the Board because of the six months' statute of limitation period) and maintained it (in the sense of not rescinding the agreement) but Council *did not administer* the union hiring hall. Dispatching of men was handled by Local Union 242, a separate entity. (R. 14) The *nexus* of Council to this case can, therefore, be found solely in the contractual provisions of the agreement.

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[4] Id. at 173-74.

Since the Board has made it clear that its decision is made on the basis of the contract apart from any other evidence in the case, it must be inferred that the agreement in itself was in violation of the Act in the Board's view, even though in fact there is no evidence to show illegal discrimination. Under these circumstances it appears that the Board's rules and regulations make unlawful this contract and any other, even though the parties intend to operate the union hiring hall in a proper manner and in fact do so. The Board assumes the power to require that the collective bargaining of the parties must result in a document containing the words prescribed by the Board.

It is respectfully submitted that whether the actions of the Board in this regard be viewed as an adjudicatory matter or as an evidence of rule making power, the Board has exceeded its authority.

II. The Rules and Regulations Governing the Establishment of Union Hiring Halls Which Were Promulgated by the Board in the Mountain Pacific case Are Not in Accordance with Law, Are in Excess of the Statutory Authority of the Board and Were Made Without Observance of Procedure Required By Law.

A. Authority of the Board to Issue Substantive Rules and Regulations

Sec. 6 of the Act confers upon the Board authority to make, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of the Act. Sec. 8 (a) (2) also refers to rules and regulations relating to employer-employee conferences during working hours. It is, however, doubtful that the Congress, at least since the Taft-Hartley re-enactment of Sec. 6 in 1947, intended to confer upon the Board the power under Sec. 6 to issue substantive rules, with the exception of the rules and regulations specifically

referred to in section 8 (a) (2). The legislative history underlying the change in Sec. 10 (c) from "all the testimony" to "the preponderance of the testimony" and in 10 (e) from "evidence" to "substantial evidence on the record considered as a whole" plainly indicated the Congressional intent to forestall recurrence of such decisions as those in *Republic Aviation* v. *NLRB,* 324 U.S. 793 and *Letourneau Company* v. *NLRB,* 324 U.S. 793.

Thus S. Rept. No. 105, on S. 1126, 80th Cong. 1st Sess., referring to the change in Sec. 10 (e) explains the reason therefor:

> "Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the courts not to disturb Board findings even though they may be based on questions of mixed law and fact (*NLRB* v. *Hearst Publications,* 322 U.S. 111, 102 F2d 638) or inferences based on facts which are not in the record (*Republic Aviation v. NLRB,* 324 US 793 and *Letourneau Company v. NLRB* 324 US 793) . . . it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails."

And H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. at pp 55-56 states:

> "In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and fact (*NLRB v. Hearst Publications, Inc.,* 322 U.S. 111; *NLRB v. Packard Motor Car Co.,* decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation v. NLRB,* 324 US 793; *Le Tourneau Company v. NLRB,* 324 US 793).
>
> ". . . presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions . . .

> "(T)he courts . . . will be under a duty to see that the Board observes the provisions of the earlier sections [10 (b) and 10 (c)] and that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in . . . [the] *Republic Aviation* and *Le Tourneau,* etc. cases . . . without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act."

In *Republic Aviation* and *Le Tourneau* the court approved the Board's establishment of a rebuttable presumption to the effect that an employer's banning of solicitation in a plant during non-work time is illegal in the absence of evidence that special circumstances necessitated the employer's no-solicitation rule. The legislative history thus reveals an intent to preclude the Board from creating rebuttable presumptions of illegality. It would follow *a fortiori* that the intent of Congress, at least since the amendatory act of 1947, was to preclude the issuance of substantive rules which are tantamount to conclusive presumptions of illegality.

That the Board has not at any time in its 23-year history attempted to exercise formally such a substantive rule-working power is not conclusive but is persuasive against the existence of any such power. An examination of the Board's Rules and Regulations issued under Section 6 of the Act shows that such rules and regulations are limited to matters of practice and procedure before the Board. Even the powers contemplated by section 8 (a) (2) of the Act have not been exercised.

B. The Rules and Regulations Governing the Establishment of Union Hiring Halls Promulgated by the Board Are Not in Accordance With Law And Are in Excess of The Statutory Authority of The Board

The Board is empowered by section 10 (a) "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." It should be noted parenthetically that this statutory power is applicable solely to alleged violations defined in the Act and not to rules and regulations prescribed by the Board. The steps in the adjudicatory proceeding are carefully set forth and it is further provided in section 10 (c) that:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any *such unfair labor practice* [i.e. listed in section 8], then the Board shall state its *findings of fact* and shall issue and cause to be served on *such person* an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (italics supplied).

Section 10 (e) provides that "the findings of the Board with respect to questions of fact if supported by *substantial evidence on the record as a whole* shall be *conclusive.*" (Italics supplied). It is apparent that Congress established statutory standards of lawful conduct in section 8 and vested administrative power in the Board to apply such standards to the particular case based upon the preponderance of the testimony taken in the particular adjudicatory proceeding.

What the Board has done here is to lay down an inflexible rule or regulation governing the disposition of this and all future cases and having present legal effect on all parties subject to its command by reason of the applicability of the *Brown-Olds* remedy. The said rule or regulation of the

Board has the effect of transferring the burden of proof from the General Counsel to the respondent and, indeed, of preventing the respondent from disproving the alleged violation of the statutory standard prescribed in section 8, if the language of the particular union hiring hall agreement, although otherwise lawful on its face, does not accord with the specific requirements of the *Mountain Pacific* rule. Even if it is assumed, for the purposes of this case, that the Board has power to issue substantive rules and regulations it is respectfully submitted that it is plain that this particular regulation is not in accordance with law and exceeds the statutory authority of the Board.

Other Federal administrative agencies have fallen into similar error and have been corrected by the Federal judiciary.

In *Miller v. U. S.*, 294 U.S. 435 (1935) the Administrator of Veterans Affairs issued a regulation to the effect that loss of the use of one hand and one eye constituted "total permanent disability" under a war risk insurance statute providing for payments for "total permanent disability". The statute empowered the Administrator "to make such rules and regulations, not inconsistent with the statute, as may be necessary or appropriate to carry out its purposes." The Supreme Court ruled that

> "It [the regulation] is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the Act. It is not in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force . . . is that in respect of compensation allowances [a different program under a Title of the statute different from the war risk insurance program], loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character . . . constitutes total permanent disability is left to be determined as a matter of fact.

> *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred by the statute, is to make regulations to carry out the purposes of the Act—not to amend it." (at p. 439) (italics supplied)

Another case holding to similar effect as the *Miller* case is *Work v. Mosier,* 261 U. S. 352 (1923). In the *Mosier* case the statute permitted the Commissioner of Indian Affairs, subject to the supervision of the Secretary of Interior, to withhold the payment to parents of minors of income from land owned by Indian tribes, if he is satisfied that the said interest of any minor is being "misused or squandered". The Secretary of Interior issued an order under this statute providing that no more than $50 per month would be paid to parents in the future, unless a specific showing was made that the funds were being used for the specific benefit of the children. The Supreme Court held that the order exceeded the power vested in the Secretary in that it seeks to lay down a general rule for the future, whereas under the statute he is to decide each case as it comes up. The Court stated:

> "The record shows that the Secretary enlarged this discretion vested in him . . . into a power to lay down regulations, limiting in advance the amount to be paid to the parents. . . . However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary.
>
> ". . . The proviso (re misuse) did not confer on him a power to determine in advance by general limitation a monthly rate . . . nor did it enable him to require before payment a showing. . . ." (at pages 359-360.)

The basic effort of the Board in the *Mountain Pacific* case to substitute the promulgation of rules and regulations governing the formation and establishment of union hiring

halls for the case-by-case determination of fact required by the statute is subject to the same defect of lack of legislative authority which was found by the Supreme Court in the *Miller* and *Mosier* cases, *supra.* The Board is not authorized to substitute its policy for the Congressional policy.

In *Colgate-Palmolive-Peet Company v. NLRB,* 338 U. S. 355 the Supreme Court reviewed the so-called Rutland Court Doctrine of the National Labor Relations Board. Under that Doctrine the Board held that even under a valid closed shop contract the union could not seek to secure the discharge of employees engaged in dual union activity at a time when it was permissible to contest the status of the bargaining representative in a represenation proceeding under the Act. The Court took the view that a valid closed shop contract must be given full effect in accordance with its terms and rejected the Rutland Court Doctrine. The basic position of the Court on the matter of the relationship between Administrative and Congressional policy was stated as follows:

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." (at page 363).

In addition to the above mentioned deficiencies, the rules and regulations promulgated by the Board in the *Mountain Pacific* case are in conflict and are inconsistent with specific sections of the statute.

The *Mountain Pacific* rule relieves the General Counsel of the burden of proof. Under section 10 of the Act, the

burden of proving a violation of the Act rests at all times upon the General Counsel. (*NLRB v. D. Gottlieb and Co.,* 208 F. 2d 682, C.A. 7 (1953); *NLRB v. Miami Coca Cola Bottling Co.,* 222 F. 2d 341, C.A. 5 (1955); *NLRB v. West Point Manufacturing Co.* 245 F. 2d 783, C.A. 5 (1957). This burden of proof never shifts. (*NLRB v. Winter Garden Citrus Products* 260 F. 2d 913, 35 L. C. ¶71, 940, 43 LRRM 2112, C.A. 5. (1958). Even the fact that an arrangement has an inherent capacity for discriminatory application and is administered by a party with strong bias in the matter does not shift the burden of proof. (*Interlake Iron Corp. v. NLRB,* 131 F. 2d, 129 (C.A. 7, 1942). This fundamental requirement with respect to the burden of proof would, as this Court ruled in *NLRB v. Swinerton,* 202 F. 2d 511 (C.A. 9, 1953), be disregarded by the rule promulgated by the Board.

The *Mountain Pacific* rule requires the parties to agree to the explicit language set forth in the rule. Section 8 (d) defines the duty to bargain collectively and specifically provides that the obligation to bargain collectively "does not compel either party to agree to a proposal". As stated in the early decision of the Board in *Consumers' Research, Inc.* 2 NLRB 57, "By the Act, the terms of agreement are left to the parties themselves; the Board may decide whether collective bargaining negotiations took place, but it may not decide what should or should not have been included in the union contract." (at page 74). This proposition should not be confused with the undoubted power of the Board to declare provisions in contracts which transgress the requirements of the statute to be illegal, as in the case of an agreement which provides for illegal preference in employment.

The *Mountain Pacific* rule gives the employer a unilateral right to determine whether he shall accept any particular applicant for employment; this subject is removed from collective bargaining. It has been held, however, that applicants for employment are covered by the Act as well as

employees. (*Phelps-Dodge Corp. v. NLRB* 313 U. S. 177.) It cannot be doubted that under section 8 (d) and section 8 (a) (5) of the Act the employer would be guilty of a refusal to bargain charge if he refused to discuss a clause requiring that his rejection of applicants be made for cause, or that he select applicants in accordance with an area plan of seniority.

The *Mountain Pacific* rule requires that the parties "post" "all provisions relating to the functioning of the hiring arrangement, including the safeguards that we [Board] deem essential to the legality of an exclusive hiring agreement". (S.R. 203). Failure to comply with this requirement makes the agreement illegal even though all other requirements have been satisfied. (See *E. and B. Brewing Company, supra*). Section 10 (c) of the Act provides, however, that an order requiring parties 'to take affirmative action" can be made only after the adjudicatory procedures of the Board have been completed.

In all of these regards, the rules and regulations promulgated by the Board in the *Mountain Pacific* case are in direct conflict with the statute, and therefore are not made in accordance with law and exceed the authority of the Board.

C. The Rules and Regulations Contained in the Mountain Pacific Case Were Made Without Observance of Procedure Required by Law.

Even if the Board had the power to issue the rules and regulations contained in the *Mountain Pacific* case, the decision should be set aside because the applicable procedures of law have not been observed. Section 6 of the Act, which contains an amendment enacted in 1947, requires that rules and regulations of the Board be made "in the manner prescribed by the Administrative Procedure Act". Section 4 (a) and (b) of this Act provides for public notice of proposed rulemaking which shall include "the terms or sub-

stance of the proposed rule or a description of the subjects and issues involved" and also an opportunity for all interested persons to participate in the rulemaking, through submission of their views. The appropriateness of such procedure, in the instant case, is apparent. The Board has, in this case, issued a general rule of widespread application to all American industry, even though it did not have before it the economic facts relating to the various industries affected by the rule. There are, also, substantial variations in fact within any particular industry. In the Building and Construction Industry, for example, there are approximately 18 different trades. The applicable facts in each of these trades may be expected to be different, yet the Board has established a uniform rule and regulation applicable to many different situations of which it could not possibly have any knowledge.

It is of interest to note that this Court raised the question as to the application of the Administrative Procedure Act to the matter of the Board's assuming jurisdiction in adjudicatory proceedings. (*NLRB v. Guy F. Atkinson Company et al,* 195 F. 2d, 141 (C.A. 9, 1952). The Court pointed out that substance rather than form must govern, but did not decide the question of the applicability of the Administrative Procedure Act because it was unnecessary to the decision of the actual case. The Board did not follow the procedures of the Administrative Procedure Act in its 1954 revision of Jurisdictional Standards. The procedures of the Administrative Procedure Act were followed, however, by the Board in its 1958 revision of such Jurisdictional Standards and are being followed in the currently proposed 1959 revisions. (NLRB Release R-570, 42 LRR 363; NLRB Release R-586, 43 LRR 233).

The prescription of specific standards for exclusive union referral agreements is no less than the assertion of jurisdiction, a subject of rulemaking under the appropriate procedures appertaining thereto.

III. The Board Is Not Empowered To Adjudicate Cases on a Class Basis In The Exercise to Its Quasi-Judicial Authority.

Intervenor has contended in previous sections of this brief that the *Mountain Pacific* doctrine is a rule or regulation having the force and effect of substantive law and should be reviewed judicially on that basis. This contention is founded on the basic assumption that substance rather than form determines the character of the administrative action. See *Guy F. Atkinson v. NLRB,* 195 F. 2d 141, (C.A. 9, 1952).

The Board has not, however, clearly defined the legal status of its doctrine. It prefers to promulgate such doctrine as an incident of its quasi-judicial powers. Yet the effect of the Board's decision is to establish a clear and sweeping rule or regulation applicable to wide areas of American industry. It is respectfully submitted that even if the vague and unnamed label applied by the Board to its doctrine is accepted, its attempted exercise of quasi-judicial powers on a class basis is illegal.

The Board has decided herein that the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring feature. (S.R. 197). Subsequent action by the Board has confirmed the interpretation that the *Mountain Pacific* decision was intended to apply to all industries and to all cases. *Houston Maritime Assn.,* 121 NLRB No. 57, 42 LRRM 1364; *Los Angeles-Seattle Motor Express,* 121 NLRB No. 205, 43 LRRM 1029; *E & B Brewing Co.,* 122 NLRB No. 50, 43 LRRM 1128 and *Schenley Distillers,* 122 NLRB No. 61, 43 LRRM 1155.

It is respectfully submitted that although the administrative process is flexible, it is not sufficiently expandable to allow this procedure.

The Board has sought in other non-rulemaking proceedings of adjudicatory nature to make similar class rulings.

These proceedings have related to the Board's power to decline to assert jurisdiction, which would appear to be an area allowing broader scope to the exercise of administrative discretion (since considerations of budgetary nature, personnel and similar items are involved) than in the interpretation of substantive provisions of law applicable to the parties, as in the instant case. Nevertheless, the Supreme Court has struck down the Board's attempt to make a class ruling in the jurisdictional cases. In *Office Employees International Union, Local No. 11 v. NLRB,* 353 US. 312, the Supreme Court held that it was beyond the power of the Board to decline to assert jurisdiction over unfair labor practice complaints against unions as a class, when acting as employers. The Court stated that

> "We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary and was beyond its power." (at p. 320).

It is respectfully submitted that for the reasons stated in this section of the brief and in the preceding sections, the same conclusion should be applied to the *Mountain Pacific* decision. It should be noted, in this connection, as has been previously discussed in detail, that the *Mountain Pacific* rule transgresses specific provisions of the Act relating to such matters as burden of proof, definition of collective bargaining and procedures required to be maintained *before* ordering parties to take affirmative action.

See also *Hotel Employees Local No. 225 v. Leedom,* 358 US 99, 36 L.C. ¶65,023 (Nov. 24, 1958) where the Supreme Court held that:

> "We believe that dismissal of the representation petition on the *sole ground* of the Board's long standing policy not to exercise jurisdiction over the hotel industry as a class, is contrary to the principles expressed in *Office Employees v. Labor Board,* 353 U.S. 313, 318-320." (Italics supplied).

The decision of the United States Court of Appeals for the Eighth Circuit in *NLRB v. Teamster Local 41,* 225 F. 2d

343 (Aug. 26, 1955) (*Pacific Inter Mountain Express Co.*) cannot be relied upon for the contra position. The factual distinction between delegation of authority as to seniority and the use of union hiring halls is discussed fully in the Trial Examiner's Intermediate Report (R. 25-30). The judicial decree of the Court of Appeals and the explanation thereof contradict the proposition that the contractual provisions in that case were actually treated by the Court as per se illegal.

The order of the Board directed the union (1) to cease and desist from preforming or giving effect to the provisions of the contract with the employer, or with any other member of a motor carrier group, which delegated authority to the union to settle controversies over seniority, and (2) from making or renewing such agreement with any other employer. The Court enforced only that part of paragraph (1) of the order in relation to the contract with *Pacific Inter Mountain Express Company,* the immediate employer, and refused enforcement of paragraph (2) of the Board's order.

In explaining its limitation of the order to the contract with the immediate employer, the Court said

> "We desire to make it clear and to emphasize, in consonance with what has precedingly been said, that we are allowing the union to be prohibited here from performing or giving effect in any way to the contract provision *in the particular situation, not because of its having made the contract provision, but because of the abuse to which it has seen fit to put the provision in the specific situation.* This abuse has been such that we think the Board could properly have left the union where it would not be able to make any further possible use of the provision *in the particular employment situation,* even if the provision itself had been generally valid."

Compare Petitioner's Brief p. 31 fn. 24.

The decision of the Board in the instant case is based solely on the hiring provisions apart from any other evi-

dence in the case. It is not based on evidence of alleged abuses in the particular situation. This is clearly brought out by comparing the decision of the Board here with a previous decision on the same contract in *Mountain Pacific, Seattle and Tacoma Chapters AGC, Jussell and Gaulke,* 117 NLRB 1319 (April 22, 1957). There, a majority of the panel of the Board based its decision on evidence of abuses rather than contract language. A single concurring member affirmed the Trial Examiner's Report on the assigned ground that the contract was per se violative of Sections 8 (a) (3) and (1) and 8 (b) (1) (A) and (2) of the Act. It is this concurring position which appears to be followed generally by the Board in the instant *Mountain Pacific* case.

It is respectfully submitted that the "grounds upon which an administrative order must be judged are those upon which the record discloses its action was based". *S.E.C. v. Chenery Corp.,* 318 U.S. 80 at p. 87. The effort in the Petitioner's brief to change the grounds of decision of the Board (see, for example, pp. 31, 12-13) should not affect the review of this case.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should not reverse its rule in *Swinerton* and that the portions of the Order of the National Labor Relations Board which have been excepted to by Respondents should be denied enforcement.

Respectfully submitted,

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. Secs. 151 et seq.), are as follows:

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any dis-

crimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

Union Unfair Labor Practices

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

* * * * * * * * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * * * * *

Prevention of Unfair Labor Practices

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsisent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C.*)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon

such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and

to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

The relevant provisions of the Administrative Procedure Act (5 U.S.C. Secs. 1001 et. seq.) are as follows:

Public Information

SEC. 3. [5 U. S. C. § 1002]. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the FEDERAL REGISTER (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon

named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) *Opinions and orders.*—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) *Public records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Rule Making

SEC. 4. [5 U. S. C. § 1003]. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the FEDERAL REGISTER (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a decription of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an

opportunity to participate in the rule making through submission of written data, views, or arguments with or without apportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective dates.*—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Judicial Review

* * * * * * * * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to

the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15985

ROBLEY H. EVANS and JULIA M. EVANS,
husband and wife,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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STATEMENT OF JURISDICTION.

Petitioners, husband and wife, filed their joint income tax returns for the years 1950 and 1951 with the Collector of Internal Revenue for the District of Washington (R. 21).

A notice of deficiency was mailed by respondent to petitioners on March 9, 1955, pursuant to Section 6212 of the Internal Revenue Code of 1954 (hereinafter called the "1954 Code"). The deficiencies determined by the respondent were for income taxes for the calendar years 1950 and 1951 in the respective amounts of $32,847.62 and $49,514.04, a total of $82,361.66 (R. 21).

On or about May 31, 1955, petitioners duly filed a petition with the Tax Court of the United States for a redetermination of the asserted deficiencies, pursuant to Section 6213 of the 1954 Code (R. 17).

By its decision rendered on February 7, 1958, the Tax Court redetermined the deficiency to be $13,191.52 for 1950 and $13,048.12 for 1951, a total of $26,239.64 (R. 34).

Pursuant to Section 7483 of the 1954 Code, petitioners filed a petition for review of the decision of the Tax Court by the United States Court of Appeals for the Ninth Circuit on March 10, 1958 (R. 96).

The office of the Collector (now Director) of Internal Revenue to whom petitioners made returns of the tax in respect of which the adjudged tax liability arose is located within the jurisdiction of this Court. This Court has jurisdiction of a review of the decision of the Tax Court herein under the provisions of Section 7482(b)(1) of the 1954 Code.

STATEMENT OF THE CASE.

(1) Petitioner's business.

During the years 1950 and 1951, petitioner Robley H. Evans (hereinafter the word "petitioner" refers to Robley H. Evans) was engaged in the business of leasing automobiles to Evans U-Drive, Inc. (hereinafter "U-Drive") at a monthly rental of $45 per automobile. U-Drive was managed by the petitioner and was engaged in the business of leasing and renting automobiles to the public. Some of U-Drive's automobiles were leased for extended periods and the rest were rented for relatively short terms, ranging from a few hours to several weeks (R. 21-22, 42-45).

Under the terms of the lease agreement between petitioner and U-Drive, petitioner was obligated to furnish U-Drive with a sufficient number of automobiles to enable it to operate and conduct its leasing and renting business efficiently. Automobiles which, from time to time, became surplus to U-Drive were returned to petitioner, who disposed of them (R. 21-22, 43-46, 64-65).

Automobiles leased by U-Drive to others for extended periods of time were purchased by petitioner as required. At the termination or cancellation of such leases, the automobiles were returned to petitioner, who sold them (R. 46, 64). When sold, such automobiles had been driven an average of 50,000 miles (R. 54). They were generally in good physical condition and state of repair at the time of sale (R. 54, 58), and petitioner could have continued to use them longer than he did (R. 80-83).

Petitioner periodically owned more automobiles than were necessary for the efficient operation of the short-term rental business of U-Drive. When this situation occurred, he would examine the cars in use and sell the number which were not needed. The oldest and least desirable automobiles were sold first (R. 47, 51, 54). When sold, such automobiles had been driven an average of 15,000 to 20,000 miles (R. 54).

(2) Factors affecting purchase and sale of vehicles by petitioner.

There was no way to predict what an automobile would bring some 18, 24 or 36 months in the future, when the lease terminated and the automobile might be disposed of (R. 65). It was impossible for the petitioner to project what the sales price of an automobile was going to be when he bought it, because he never knew when he was going to dispose of it, and could not foresee 18, 12 or even 6 months ahead, the effects of the numerous economic and other factors affecting used automobile values (R. 71).

Among these factors were strike conditions, manufacturing conditions, the development of new accessories, the advent of war and the anticipation of rationing (R. 66, 69, 71).

During the years 1950 and 1951, the petitioner disposed of certain automobiles used in his business at the respective times and for the respective prices set forth in Exhibit A to the respondent's deficiency notice of March 9, 1955 (R. 22), the petitioner having purchased these automobiles at the respective dates and for the respective prices set forth in said Exhibit (R. 22).

(3) Accounting practice as to "useful life".

Certified public accountants—partners, respectively, in the firms of Ernst & Ernst and Price Waterhouse & Co., whose experience and background stamp them as outstanding leaders in the accounting profession in the United States—testified that "useful life" has consistently meant and still means, for both accounting and federal income tax purposes, not the period of use of an asset in the hands of the taxpayer—erroneously termed by the respondent the "life" in the hands of the taxpayer—but the economic life, the general business life, of the asset in whatever hands (R. 83-91).

(4) The taxes here involved.

During the years in issue, petitioner depreciated the automobiles which he leased to U-Drive at the rate of 25% per annum without any allowance for salvage value. This rate represented a four-year useful life, and resulted in deductions in the amounts of $77,972.71 and $92,890.05 for the years 1950 and 1951, respectively (R. 22). Such amounts were deducted pursuant to the provisions of Section 23(l) of the Internal Revenue Code of 1939 (hereinafter called the "1939 Code"), applicable to the years in issue.

On March 9, 1955, respondent sent petitioner a statutory notice of deficiency pursuant to Section 6212 of the 1954 Code, alleging, among other things, that petitioner had overstated the depreciation deductions allowable with respect to automobiles which petitioner leased to U-Drive during 1950 and 1951. In the notice of deficiency, respondent recomputed depreciation for the years 1950 and 1951 in the respective amounts of $21,858.62 and $30,374.13, stating that the average useful life of automobiles in petitioner's business was not in excess of seventeen months

and the average salvage value of said automobiles was not less than $1,325.00 or the adjusted basis of said automobiles as of January 1, 1950, whichever amount was the lesser (R. 12).

In computing the rate of depreciation for automobiles leased to U-Drive in 1950 and 1951, petitioner used their physical or inherent functional life (*i.e.*, their life for general business purposes)—four years. Petitioner did not take into account any amount for salvage value, since it merely represented the residual, junk or scrap value of the automobiles after the end of their "useful life" as defined above. In his notice of deficiency, respondent claimed that the "useful life" of petitioner's automobiles should be determined not on the basis of their physical or inherent functional life but rather on the basis of the average period during which petitioner held them as income-producing property in his business (R. 12). Respondent also claimed that the salvage value of such automobiles should be determined for the years in issue by taking the average of the amounts realized by petitioner from the disposition of his automobiles during those years (R. 12).

(5) The Tax Court proceeding.

Pursuant to Section 6213 of the 1954 Code, petitioners appealed to the Tax Court for a redetermination of respondent's proposed deficiency on this issue, their petition being duly filed on or about May 31, 1955. Trial was held in Seattle, Washington, on February 5, 1957. On July 31, 1957, the Tax Court filed a memorandum opinion (R. 24-33) holding that the automobiles which petitioner leased to U-Drive during the years in issue for use under extended term leases had a useful life of three years and a salvage value of $600, and that the automobiles which petitioner leased to U-Drive for use in its short-term rentals had a

useful life of 15 months and a salvage value of $1,375. With respect to the salvage value issue, the Tax Court further held that if the "undepreciated cost" (apparently meaning adjusted basis) of the automobiles in service at January 1, 1950, was less than $600 and $1,375 for the respective classes of automobiles, that amount should be the salvage value of those automobiles. The Tax Court adopted respondent's definitions of useful life and salvage value with respect to petitioner's automobiles although, in the case of automobiles used by U-Drive for short-term rentals, the opinion of the Tax Court was even more adverse to the petitioner than the respondent's determination. Pursuant to that opinion, a decision was entered under Rule 50 of the Rules of the Tax Court on February 7, 1958 (R. 34), adjudging a total deficiency of $26,239.64 for the years 1950 and 1951, of which $23,139.12 is attributable to the issue here involved—petitioner's deductions for depreciation of automobiles leased to U-Drive during those years. The balance of the deficiency is attributable to issues settled by stipulation.

On March 10, 1958, petitioners filed a petition for review by this Court of the decision of the Tax Court with respect to the automobile depreciation issue.

QUESTIONS PRESENTED.

(a) Whether the term "useful life", as applied to automobiles used in petitioner's automobile leasing business, in computing the depreciation allowance under Section 23(l) of the 1939 Code, means (1) the physical or inherent functional life of such automobiles (*i.e.*, their life for general business purposes), a four-year life, as reported by petitioner; or means (2) an average, or other imputed, holding period of such automobiles, fifteen months or three years, as the case may be, as decided by the Tax Court; and

(b) Whether the term "salvage value", as applied to such automobiles, means (1) the residual, junk or scrap value of such automobiles after the end of their physical or inherent functional useful lives, as contended by petitioner; or means (2) the estimated proceeds from the disposition of such automobiles which may be realized by the petitioner based upon an assumed value and an assumed disposition of such automobiles before the end of their useful lives after an estimated period of use, as decided by the Tax Court.

STATUTE AND REGULATIONS INVOLVED.

The basic statute and regulations involved are Section 23(l) of the 1939 Code, and Regulations 111, Section 29.23(l)-1, promulgated thereunder. The statute and regulations are set out in full text in Appendix A to this Brief.

SPECIFICATION OF ERRORS.

The Tax Court erred:

(1) In deciding that automobiles leased by petitioner had a useful life, for depreciation purposes, based on the period during which such automobiles were held by petitioner as income-producing properties in his automobile leasing business, and in thereby deciding that:

(a) the useful life, for depreciation purposes, of automobiles leased for relatively extended periods was three years rather than four years, and

(b) the useful life, for depreciation purposes, of automobiles rented for short periods was fifteen months rather than four years.

(2) In deciding that automobiles leased by petitioner had a salvage value, for depreciation purposes, based on the proceeds realized by petitioner when he dispensed with such automobiles as income-producing property in his automobile leasing business, and in thereby deciding that:

(a) the salvage value of the automobiles leased for relatively extended periods was $600 rather than junk or scrap value,

(b) the salvage value of automobiles rented for short periods was $1,375 rather than junk or scrap value, and

(c) if, on January 1, 1950, any automobiles of either class had an "undepreciated cost" less in amount than $600 or $1,375, respectively, such lesser amount was the salvage value of such automobiles rather than junk or scrap value.

(3) In holding that there are deficiencies in income tax for the calendar years 1950 and 1951 in the respective amounts of $13,191.52 and $13,048.12.

(4) In that its opinion and decision are contrary to law and are not supported by substantial evidence.

ARGUMENT.

Summary.

Precise definition of the related terms "useful life" and "salvage value" is fundamental to a determination of depreciation for federal income tax purposes. Neither term is defined in the 1939 Code or in the regulations promulgated thereunder. In the absence of statutory or regulatory definition, the meaning of these terms must be obtained from the judicial decisions, the administrative practice of the Treasury Department and expert opinion. A thorough review of such authorities establishes that:

(1) The term "useful life" of property, for depreciation purposes, means the physical or inherent functional life of that property (i.e., the property's life for general business purposes), and not the period during which it is estimated that it will be held by a taxpayer as income-producing property in his particular business; and

(2) The term "salvage value" of property, for depreciation purposes, means the residual, junk or scrap value of property remaining after the end of its "useful life", as defined above, and not the estimated proceeds which may be realized from the disposition of the property when a taxpayer dispenses with it as income-producing property in his particular business before the end of its useful life.

Under these definitions, the automobiles in petitioner's automobile leasing business had a useful life of four years and a salvage value determinable at the end of such period.

The decision of the Tax Court in the instant case is based on erroneous definitions and applications of both terms, and for that reason it should be reversed.

Until the opinion of the Tax Court herein, judicial interpretation, administrative practice under the 1939 Code and expert opinion had long agreed that for purposes of the depreciation deduction "useful life" means the physical life of the property, not the intended or actual period of the taxpayer's use of the property.

Similarly, judicial interpretation, administrative practice and expert opinion agreed that "salvage value," the value remaining in depreciable property at the end of its useful life, was the residual or scrap value of fully depreciated property, not the proceeds from its sale at the end of a particular holding period of a specific taxpayer.

We submit that these principles are established by unimpeached testimony elicited at the trial and by the judicial and administrative precedents cited by petitioner. The Commissioner seeks to abandon such precedents after they have been confirmed by more than 35 years of use.

I.

The useful life of an asset for federal income tax depreciation purposes has long been defined as being the physical life of the asset, not some shorter period during which a particular taxpayer may happen to hold such asset.

Petitioner's position in the case at bar with respect to the meaning of useful life is amply supported by the long history of interpretation and practical application given this phrase (1) by the Commissioner of Internal Revenue, (2) by the courts, and (3) by the accounting profession.

"Useful life" has long been defined as the period during which an asset is physically useful for business purposes. Useful life refers to the total employment of the asset in the economy, whether by one or more users, rather than to the shorter period of its usefulness to a particular taxpayer for a given use.

It has long been recognized that the particular operating practice of a taxpayer has important effects on the physical life of an asset. Thus the particular use may shorten the total period of economic usefulness materially—usually through abnormally heavy operation or undermaintenance. To the extent that such operating practice is proved, a particular taxpayer is permitted to adjust his depreciation rate accordingly. The novel theory advanced by the Commissioner of Internal Revenue in this case, however, is not based on this proposition. The Commissioner wishes, rather, to disregard the fact that the asset has years of useful life left after the taxpayer sells it. He wants to lower an iron curtain at the end of the period of the taxpayer's use of the property, and to limit his recognition of "useful life" solely to the partial life of the assets in the hands of the first user. Such a fractional recognition of useful life is new in the tax depreciation field, as the taxpayer showed.

(a) The Commissioner's regulations.

The meaning of the term "useful life" has emerged from years of practice rather than from any clear, unambiguous statutory or regulatory language. The term is not mentioned in the depreciation provisions of the 1939 Code, the law applicable to the years here in issue, nor is it mentioned in any of the prior revenue acts.

The various and successive income tax regulations beginning with Regulations 45, Article 161 (effective for the tax years 1918, 1919 and 1920) do mention the terms "useful life" and "salvage value". Article 161 provided, in part, as follows:

> " . . . The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a *consistent* plan by which the aggregate of such amounts for the useful life of the property in the business will suffice, with the salvage value, at the end of such useful life to provide in place of the property its cost. . . ." (Emphasis added.)

Furthermore, Article 165 of Regulations 45 also mentioned the term "useful life" and provided, in part:

> "The capital sum to be replaced should be charged off over the useful life of the property either in equal annual installments or in accordance with any other recognized trade practice. . . . "

Similar wording, with changes not material to this discussion, continued in successive sections or articles of the various and successive income tax regulations through Regulations 103, Section 19.23(l)-1,-5 (effective for the tax years 1939, 1940 and 1941). It should be noted, however, that no further explanation or clarification appeared in any of these regulations in reference to useful life or salvage value.

We come then to Regulations 111, Section 29.23(l)-1. These regulations were in effect for the tax years 1942 through 1951, and hence are the regulations applicable to the years involved in this case. We call to this Court's attention the fact that the phrase "in the business" was *omitted* from those regulations. They provided, in part:

> " . . . The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably *consistent* plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the *useful life of the depreciable property* ['in the business' *omitted*], equal the cost or other basis of the property determined in accordance with section 113. . . ." (Emphasis added.)

Regulations 118, Section 39.23(l)-1 (effective for tax years beginning after December 31, 1951) contained identical language.

It is very significant that the Commissioner's regulations in effect during the years here in issue, 1950 and 1951, did not contain the phrase *"in the business"* which was found in prior regulations. It is clear from a review of the cases hereinafter discussed, *and particularly from the respondent's position therein,* that the earlier regulations and the phrase "in the business" contained therein were not intended by respondent to limit useful life to the holding period of a particular taxpayer. We submit that probably one of the respondent's reasons for deleting the phrase "in the business" from Regulations 111, Section 29.23(l)-1 was the fact that he had consistently taken the contrary position before the courts in order to establish longer "useful lives" and consequently smaller annual depreciation deductions.

(b) The Commissioner's own pronouncements.

(i) In O.D. 845, C.B. January—June 1921, page 178, the Treasury Department took the position that the term "useful life" means "the period of time over which an asset *may* be used for the purpose for which it was acquired." (Emphasis added.) It should be noted that there are no words of limitation and that this interpretation is in terms of the usability of the asset itself for general business purposes, without consideration of whether the particular taxpayer uses it up himself or sells it before the end of such usability.

(ii) For many years before the taxable years here under review, the Commissioner had issued Bulletin "F" (Rev. Jan. 1942), setting forth the Bureau's general depreciation policy and tables of estimated lives of particular kinds of assets. Bulletin "F" is the official guide to depreciation policy and rates issued by the Commissioner of Internal Revenue. Bulletin "F" stated in the first sen-

> "The Federal income tax in general is based upon net income of a specified period designated as the taxable year. The production of net income usually involves the use *of capital assets which wear out, become exhausted, or are consumed in such use. The wearing out, exhaustion, or consumption* usually is gradual, extending over a period of years. *It is ordinarily called depreciation, and the period over which it extends is the normal useful life of the asset.*" (Emphasis added.)

Again, "useful life" is referred to in terms of physical using up of assets—their total employment in the economy —rather than their employment by an individual taxpayer.

Consistent with the practice of the accounting profession and with the regulations in effect during the taxable years here under review, the petitioner employed a useful life for his automobiles based on their normal estimated physical life. In the considerable experience of the petitioner, an automobile used in a commercial business had a useful life of four years (R. 70). Furthermore, the petitioner's experience is supported by Bulletin "F", which lists estimated useful lives of various assets. The Commissioner, in Bulletin "F", recommended to taxpayers that for depreciation purposes they assign a five-year useful life to passenger automobiles and a three-year useful life to salesmen's automobiles. Since the petitioner's automobiles were rented and leased for both purposes (R. 46, 65-66), we submit that the reasonableness of a four-year useful life is sustained by the Commissioner himself.

We wish to emphasize that it was the Commissioner of Internal Revenue who issued Bulletin "F" as a guide; and it is significant that Bulletin "F" did not suggest 12 months or 24 months as the useful life of an automobile, but *five years for passenger cars and three years for salesmen's cars.* And we cannot refrain from asking why the Commissioner of Internal Revenue did not simplify his

own task by stating, in far more simple terms and in one page instead of a pamphlet, that the useful life of a depreciable asset would be *its life in the hands of the particular taxpayer* if that indeed were his view?

The Commissioner of Internal Revenue's own bulletin shows that he deems the useful life of automobiles to be their full useful life, namely, three years and five years. As the Tax Court stated in *Holmes-Darst Coal Corporation,* 11 TCM 122, 130 (1952):

> "Petitioner [taxpayer] relies upon the respondent's [Commissioner's] Bulletin 'F', issued as a guide for depreciation deductions, wherein it is stated that a useful life of 3 years for cars used by salesmen is reasonable. While the bulletin has not the force or effect of a treasury regulation, it is presumably based on the respondent's [Commissioner's] experience over a period of years."

(iii) In Rev. Rul. 108, 1953—1 CB 185, the Commissioner referred to the practice of selling automobiles after "leasing them for substantially less than their normal useful life". He certainly was not referring to a useful life which ends when the taxpayer sells the automobile.

In Rev. Rul. 54-229, 1954—1 CB 124, again the Commissioner referred to a sale of automobiles after "leasing them for a period substantially less than their normal useful life." Again he was referring to a useful life in the petitioner's terms—in terms of inherent physical life.

Would respondent contend that his published rulings are loosely drawn, with little or no regard to the language used?

It is to be noted that this use by the Commissioner of the term "useful life" occurred—in both instances—in a context in which the question of depreciation on leased cars was expressly considered; that the rulings were con-

cerned with the very business in which petitioner was engaged during the years here under review; and that the Commissioner was equating "useful life" with the total functional life of the automobiles for business purposes despite the practice of the taxpayers involved of disposing of the automobiles well before the end of such functional usability.

These rulings, and their interpretation of useful life by the agency charged with the responsibility of administering the Internal Revenue Code, are clearly of persuasive weight under the authorities. (*Billings* v. *Truesdell,* 321 U.S. 542, 552-53 [1944]).

(c) Prior cases.

The principle that "useful life" refers to the general business life of the asset itself, and not to individual holding periods of specific taxpayers, has been recognized over a long period of years by court decisions and by the Commissioner.

(i) In *Sanford Cotton Mills,* 14 BTA 1210 (1929), Acq. X-2 CB 63, the taxpayer, a manufacturer of cotton sheeting, contested the Commissioner's reduction of the rate of depreciation of motor trucks from 33-1/3% to 20%. The taxpayer made a practice of keeping the trucks for approximately 2½ years. The Board of Tax Appeals nevertheless held that a rate of 25% was reasonable, and stated:

> "On motor trucks which cost $7,400, the respondent allowed a deduction on account of the exhaustion, wear and tear thereof at the rate of 20 per cent. It was the petitioner's custom to use these trucks for approximately 2½ years and then trade them in on the purchase price of new trucks. The usual allowance on the old trucks was $1,000 on a truck costing $5,000. A reasonable deduction on account of the exhaustion, wear and tear of trucks would be at the rate of 25 per cent." (14 BTA, at 1211.)

Thus, the Board of Tax Appeals proceeded on the basis of a four-year life, although the practice of the taxpayer was to dispose of vehicles after two and one-half years—and the Commissioner officially acquiesced in this decision.

(ii) In *Merkle Broom Co.,* 3 BTA 1084 (1926), Acq. V-2 CB 2, which concerned the proper depreciation rate for the taxpayer's fleet of automobiles used by its salesmen, the taxpayer claimed 33-1/3% per annum and the Commissioner allowed 20% per annum. The Board of Tax Appeals found that the taxpayer renewed its fleet every second year, stating:

> "The taxpayer uses in its business automobiles, such as Dodges, Hupmobiles, Buicks, and Fords. These are used by salesmen in traveling throughout the country. As a rule, automobiles are exchanged for new ones at the end of the second year." (3 BTA, at 1085.)

The Board, nevertheless, held that the proper rate for depreciation was 25%—a four-year useful life. Again the Commissioner acquiesced.

(iii) In *Max Kurtz, et al.,* 8 BTA 679 (1927), Acq. VII-1 CB 18, the taxpayer contested the Commissioner's determination of a five-year useful life for business automobiles and trucks which the taxpayer made a practice of trading in after two or three years of use. The Board of Tax Appeals found as a fact that:

> "During the years involved the partnership owned certain Ford, Dodge, and Studebaker passenger automobiles and certain automobile trucks. These cars were traded in after two or three years of use at substantial values." (8 BTA, at 681.)

Yet the Board held as follows:

> "The Board is of the opinion that, upon consideration of all the evidence, the Commissioner's allowance for exhaustion, wear and tear of automobiles at the rate of 20 per cent per annum was reasonable. . . ." (8 BTA, at 683.)

The Commissioner acquiesced in the decision.

Can it reasonably be maintained, in view of the respondent's position in these cases, that the phrase "in the business" appearing in his regulations between 1918 and 1941 was intended to limit a taxpayer's useful life for depreciation purposes to the period during which the taxpayer held the asset?

(iv) In 1942, the year in which the phrase "in the business" was deleted from the regulations, respondent attempted to compel the taxpayer in *General Securities Co.*, BTA Memo., CCH Dec. 12,500-D (1942), *aff'd* 137 F. 2d 201 (C.C.A. 6th, 1943), to depreciate automobiles used in its business over a useful life of more than the three years claimed by the taxpayer. The Board of Tax Appeals found:

> "In its business petitioner used one or two automobiles in which its agents traveled over territory located in all of the southern states. Each automobile traveled some 60,000 to 75,000 miles a year. Petitioner kept his automobiles from one to two years. When petitioner traded its cars in after one year, from a value standpoint, they had a third to a half of their original value left. The normal useful life of automobiles used by petitioner in its business was three years."

The Board allowed the taxpayer to depreciate its automobiles over the three-year life *despite its finding that the taxpayer, as a matter of practice, traded in its automobiles after one to two years' use with anywhere from one-half to one-third of their original value left.* On this issue, the Board held:

> "The final issue is whether petitioner has claimed excessive depreciation on automobiles used in its business. The sole dispute is as to the anticipated useful life of the cars, considering the strenuous use to which they were put. The only evidence on the subject was

that of petitioner's president, who testified that the cars were only used a year or two but during that period covered from 60,000 to 150,000 miles. It was his opinion that under such circumstances the cars could not have had anticipated lives of more than three years. Since this is the sole issue, the question of cost of the assets, their age, condition, and earlier depreciation are not involved. *Cf.* Regulations 94, Article 23-1(5). There being no evidence to contradict that furnished by petitioner, we have found the facts in accordance with its claim. On this issue, petitioner is sustained."

In addition, it should be noted that the taxpayer in the *General Securities Co.* case was attempting to claim a shorter useful life of its automobiles because of abnormally heavy operation. Nevertheless, neither the parties nor the Board of Tax Appeals considered it proper to equate the automobiles' useful life with the taxpayer's one- or two-year period of ownership.

The position taken by the respondent in each of the cases discussed above clearly negatives any inference that the phrase "the useful life of the property in the business", which first appeared in 1918 in Regulations 45, Article 161, was intended by or even undertood by respondent to mean that useful life was the equivalent of a taxpayer's holding period of depreciable assets. Surely, after the phrase "in the business" has been *dropped out* of the regulation, it cannot be seriously contended that the proper interpretation of the regulation requires not only its reinsertion but that, *omitted,* it be given weight and emphasis it did not have when included.

(v) Other cases which similarly illustrate the traditional distinction between an asset's useful life and the period during which it happens to be used in a particular taxpayer's business are: *West Virginia & Pennsylvania*

Coal & Coke Co., 1 BTA 790 (1925); *J. R. James,* 2 BTA 1071 (1925), Acq. V-1 CB 3; *Wallace G. Kay,* 10 BTA 534 (1928), Acq. VII-1 CB 17; *W. N. Foster, et al.,* 2 TCM 595 (1943); *John A. Maguire Estate, Ltd.,* 17 BTA 394 (1929), Acq. IX-1 CB 34; *Nat Lewis,* 13 TCM 1167 (1954); and *Whitman-Douglas Co.,* 8 BTA 694 (1927). These cases all support the position that the "useful life" of property, for depreciation purposes, refers to the period of the asset's functional, physical usefulness, rather than to just the period of its use by individual taxpayers. And the principle underlying these cases is succinctly stated in *Southeastern Bldg. Corporation* v. *Commissioner of Internal Revenue,* 148 F. 2d 879 (C.C.A. 5th, 1945), cert. den. 326 U.S. 740 (1945), as follows:

> "In the case of depreciation, the deduction is granted for the reason that Congress realizing that *business property becomes worn out gradually through usage and lapse of time,* provides that an allowance should be made whereby a taxpayer could secure a return of his original costs by the expiration of the *useful or economic life of the property.*" (148 F. 2d, at 880; emphasis added.)

(d) Recent decisions.

In the recent case of *Massey Motors Inc.* v. *United States,* 156 F. Supp. 516 (D.C. S.D. Fla., 1957), the taxpayer, an automobile dealer, retained company cars both for its own use and for lease to other businesses. The taxpayer's depreciation of its company cars of both classes on the straight-line method, on the basis of a useful life of three years, was upheld by the court. The court clearly acknowledged the taxpayer's practice of selling its company cars *before the end of their useful lives*:

> "The decision to sell the company cars was made by plaintiff's management on the economic facts of whether holding a car longer would appreciably reduce

> the sales price for it. *The plaintiff followed the practice of disposing of all company and leased cars either immediately before or as soon after a model change as was practicable.* Plaintiff's management deemed it advisable to have company personnel in current model company cars. Plaintiff also disposed of leased vehicles during the year if a particular unit had been run approximately 40,000 miles. Company cars were also removed from service when they had been run approximately 10,000 miles without regard to model change." (156 F. Supp., at 520; emphasis added).

The Court held:

> "The plaintiff depreciated its company cars on the straight-line method, utilizing an estimated *useful life of 36 months, which the Court finds to be a reasonable and fair rate.*
>
> ". . .
>
> "The plaintiff is entitled to the depreciation claim [ed] on its company cars . . . in its 1950 and 1951 returns under Section 23 (l) of the 1939 Code." (156 F. Supp., at 520 and 522; emphasis added).

The situation of the petitioner in the case at bar and that of the taxpayer in the *Massey Motors* case are virtually identical as to the question here in issue. The tax years, the applicable law, the use of the vehicles, the practice of vehicle disposal and the depreciation claimed are substantially the same.

Philber Equipment Corporation v. *Commissioner of Internal Revenue,* 237 F. 2d 129 (C.A. 3rd, 1956), provides recent judicial corroboration (and respondent's own admission) of the position that a taxpayer's holding period of leased vehicles does not determine their useful lives. There, the issue was whether profit on the sale of vehicles was capital gain, or was taxable at ordinary rates—that is, whether the taxpayer held the vehicles primarily for sale to customers. The taxpayer (which was engaged in the business of leasing vehicles) regularly dis-

posed of vehicles after the end of one-year lease terms. The court stated in this regard:

> "Taxpayer knew that when equipment was purchased it would probably be able to rent the equipment for *a period substantially less than its useful life,* and sale of the equipment would follow expiration of a lease." (237 F. 2d, at 130; emphasis added.)

And respondent specifically argued this point in his brief in the *Philber* case, where he stated:

> "Because of existing conditions taxpayer knew when it purchased equipment that it would likely be able to rent such equipment only for *a period that was substantially less than its useful life.*" (Brief for Respondent, p. 5, *Philber Equipment Corporation* v. *Commissioner of Internal Revenue,* C.A. 3rd, Docket No. 11,860; emphasis added.)

And again, at page 11 of respondent's brief in that case, respondent stated:

> ". . . all of the leases involved were only for a one-year term, *a period substantially less than the useful life* of this type of equipment as its resale in the tax years and re-lease in later years demonstrates." (Emphasis added.)

It thus appears that, as late as 1956, *in the Philber case, the Commissioner himself continued to apply the unambiguous, consistent and commonly understood meaning to the term "useful life".*

We refer the Court also to *Pilot Freight Carriers, Inc.,* 15 TCM 1027 (1956), in which the taxpayer's tractors and trailers were shown to have been held by the taxpayer for average periods of 38 months and 32.6 months, respectively. Nonetheless, the Commissioner contended that their useful lives were five years and six years, respectively. The court held that the useful lives of such tractors and trailers, for

depreciation purposes, were four years and five years, respectively, as contended by the taxpayer. In that case, as in the case at bar, the respondent argued that the useful lives claimed by the taxpayer for such property were erroneously computed because, upon sale by the taxpayer, the latter received "amounts largely in excess of the depreciated cost thereof." The court rejected that argument, citing, from *Wier Long Leaf Lumber Co.,* 9 TC 990 (1947), Acq. 1948-1 CB 3 (reversed on other issues, 173 F. 2d 549 [C.A. 5th, 1949]), this principle:

> "The sole fact therefore in any specific situation that a given price is received for articles not fully depreciated throws no light on the effect upon the depreciation allowance." (9 TC, at 999.)

In *Estate of B. F. Whitaker,* 27 TC 399 (1956), the taxpayer wished to depreciate fully his race horse in the year in which it broke a leg and was no longer useful for race horse purposes. The court denied the claim, equating useful life with the period over which an asset may be subject to depreciation in the sense of physical exhaustion and not with the period during which an asset is held by a particular taxpayer for a particular use. The Court stated:

> "The petitioner computed the depreciation on Baby Jeanne on a straight-line basis. To be entitled to additional depreciation when computing it on a straight-line basis, the petitioner must show that additional *exhaustion, wear and tear* have shortened the previously estimated useful life of the asset. * * * The petitioner has shown the useful life of Baby Jeanne as a racehorse had been shortened. But the useful life has been shortened by an accidental injury, not by depreciation, *i.e., exhaustion, wear, and tear.*" (27 TC, at 406; emphasis added.)

According to the reasoning of the Court, useful life can be terminated only by the completion of the process of physical exhaustion from wear and tear.

It is significant that in each of the cases we have cited, the Commissioner took the position that the useful life of depreciable property *was a period substantially longer than the taxpayer's holding period.* One may well ask why the Commissioner now takes a position in this and other recent cases which is novel when viewed in the light of his past rulings in this field. We believe the answer is clear, and shall discuss it hereinafter at pages 31-36 of this Brief.

(e) The facts and expert testimony.

At the trial, petitioner called two expert witnesses, certified public accountants who are members of two of the outstanding accounting firms in the nation, Ernst & Ernst and Price Waterhouse & Co. Their testimony was based on their many years of cumulative experience in public accounting.

Drawing on this experience in applying the depreciation provisions of the Federal income tax law and respondent's own regulations, both testified that the term "useful life" has the same meaning for the purposes of fixing depreciation rates for tax purposes as it has in general accounting practice. Both testified that the term "useful life" means the economic or the physical life of a particular asset. Furthermore, both testified that in their dealings with representatives of the Internal Revenue Service with respect to allowances for exhaustion, wear and tear of depreciable assets, those representatives have applied the same meaning to the term "useful life" as was generally understood in their accounting practice (R. 85, 86, 89, 90).

It is significant that the respondent failed to offer any evidence to contradict the testimony of petitioner's experts

on this point. Furthermore, the record shows that their testimony remained unimpeached after respondent's cross-examination (R. 86-88, 90-92).

It is well established that testimony of expert witnesses as to the correctness and prevalence of the administrative interpretation of a phrase involving an accounting concept, such as "useful life", is particularly pertinent. It has been recognized as such by the Supreme Court of the United States in *Willcuts* v. *Milton Dairy Company,* 275 U.S. 215 (1927), where the ordinary business meaning ascribed to a corporate accounting phrase was held to provide an authoritative interpretation of that phrase as used in the Revenue Act of 1918. The Supreme Court of the United States quoted this doctrine with approval as recently as June 9, 1958 in *The Colony, Inc.* v. *Commissioner of Internal Revenue,* No. 306, October Term, 1957, 58-2 USTC Para. 9593:

> ". . . statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them."

Using the vantage point of the present, not of the dates when tax returns had to be filed, the Tax Court has looked back over the years 1950 and 1951 and on the basis of what is known today states that the average period of use of cars by petitioner was a given number of months. But that fact —now easily ascertainable—does not justify the holding that that average period of use was "useful life" for depreciation purposes.

The fact is that the *only evidence* in the record before this Court is that the factors affecting the holding periods of petitioner's automobiles were too varied and too unpredictable to enable any precise normal holding period to be determined. The only testimony offered shows incontestably that in petitioner's past experience wide fluctuations in holding periods are to be expected.

Respondent surely cannot require a taxpayer to make out his income tax return each year taking depreciation on the basis of his past experience—and then, at the end of each two- (or three- or four-) year period, to review his experience for that specific two- (or three- or four-) year period only, and file amended returns; and again at the end of the third (or fourth or fifth) year, file amended returns for the year (or two or three years) preceding. Surely the Commissioner cannot ask the Court to accept so chaotic a solution to the problem he raises. The only sound alternative is that which has been accepted for years by the Commissioner and by taxpayers: to determine at the time such assets are acquired the period of time the taxpayer may reasonably expect the assets to be *used or usable for general business purposes.* The taxpayer should not be required to wait for years in order to determine useful life on the basis of such hindsight as is now available to respondent's counsel for the taxable years 1950 and 1951.

The useful lives of 15 months and three years found by the Tax Court do not stand up under analysis. These figures happened to be the average holding periods of petitioner's cars sold during the two taxable years 1950 and 1951. Statistics to determine the particular average figures selected by the Tax Court were not available until *many months after the cars were purchased.* In some instances, the useful life cannot be determined until *several years after the purchase of the cars.* And what is so particularly compelling about using a two-year experience? The fact that there happen to be two tax years in issue here does not mean that two years (or any given number of years) is a meaningful control period.

The only evidence before this Court on the meaning of the term "useful life" is the experience of the taxpayer's witnesses, in dealing with Internal Revenue Agents in the field under the 1939 Code, that useful life meant general business life, not life in the hands of the individual taxpayer (R. 85, 89). And the position taken by the Commissioner in the decided cases (heretofore discussed) was contrary to his present position. The Commissioner's position in those cases was certainly known both to the accountants and to the agents working in the field. If respondent's counsel had been able to show that this was not the case, he could readily have called supporting witnesses from the government agency in possession of full knowledge of the facts—the Internal Revenue Service.

II.

The term "salvage value" of property, for depreciation purposes, means the residual, junk or scrap value of property remaining after the end of its "useful life", as defined above. It does not mean the estimated proceeds which may be realized from the disposition of the property when a taxpayer dispenses with it as income-producing property in his particular business long before the end of its useful life.

The meaning of "salvage value", for depreciation purposes, emerges inevitably from the preceding discussion of "useful life". It is the residual, junk or scrap value of property left after the end of its physical "useful life." "Salvage value" is not the estimated proceeds which may be realized from the disposition of the property when a taxpayer dispenses with it as income-producing property in his particular business before the end of its useful life.

In accordance with respondent's Regulations 111, Section 29.23(l)-1, depreciation over the useful life plus salvage value equals cost. Thus, salvage value must be the reciprocal of useful life—the value remaining at the expiration of the inherent physical life of property, which, as we have demonstrated above, is the proper definition of "useful life". It is that part of the value of property which can never be destroyed by depreciation of the property, that is, by exhaustion, wear and tear. The testimony of qualified expert witnesses shows that the business community regards salvage value as having such a meaning (R. 85, 87, 89, 90).

Recently, a decision of the United States District Court in Nebraska has applied the established rule with respect to the meaning of "salvage value" for depreciation purposes. In *Lydia P. Koelling, et al.* v. *United States* (D.C.D. Neb., Grand Island Div., 2/14/57, 57-1 USTC Para. 9453), it was shown that certain bulls, held in a breeding herd, were sold either to other breeders or for slaughter. Despite the fact that the bulls sold to other breeders, and thereafter used by the latter for breeding purposes, brought substantially higher prices than they would have if sold for slaughter, the court, in determining the depreciation applicable to the bulls before sale, held that the salvage value to be taken into account was their value as "slaughter" or "sausage" bulls. This value was equivalent to the scrap value we have referred to above—the value which can be realized when the asset is worn out and fit only for scrapping or conversion to a use substantially different from its original, intended use.

Respondent contended before the Tax Court that petitioner's average useful life for his automobiles matched petitioner's average holding period of 17 months and that

salvage value was $1,325, the average sales proceeds received for automobiles sold 17 months after acquisition. The Tax Court decided that the average useful life of leased automobiles was 3 years and that the average useful life of rented automobiles was 15 months. The Tax Court, *using the sales proceeds theory* of salvage value, set respective salvage values at $600 and $1,375.

The claim that salvage value is measured by, or has any relation to, sales proceeds was effectively laid to rest many years ago because it was contrary to logic and authority. For example, in *Reginald Denny,* 33 BTA 738 (1935), the Board of Tax Appeals stated:

> "From the [taxpayer's] testimony, we gather that he regarded shrinkage of market value as synonymous with loss of useful value. *The two are rarely, if ever, the same.*" (33 BTA, at 743; emphasis added.)

If, as petitioner contends and the authorities indicate, four years is the useful life of automobiles used by petitioner, the salvage value of those automobiles for depreciation purposes is their value *after four years of use.* Neither respondent nor the Tax Court has contended, cited evidence, found as fact, or held, that such value is anything other than as claimed by petitioner. The Tax Court's determination of salvage value is apparently based only on its unsupported definition of useful life.

III.

The respondent's redefinitions of useful life and salvage value are intended to nullify Section 117 (j) of the 1939 Code.

The redefinitions of "useful life" and "salvage value" tacitly assumed by the Tax Court below would require each taxpayer to make estimates of his own probable holding period of each of his depreciable assets and the probable sales price realizable at the end of that holding period. Because of the highly subjective and individual nature of these estimates, the possible area of contention between taxpayers and revenue agents would be greatly broadened. This is not a hypothetical difficulty. We submit that the respondent and the Tax Court have no authority, without the authority of legislation, to substitute, retroactively, a new subjective rule as a substitute for an objective rule which has had the force of law for over forty years.

It has been respondent's consistent policy in the past to *avoid* subjective judgments in the depreciation field. See, for instance, Rev. Rul. 90, 1953-1 CB 43 and Rev. Rul. 91, 1953-1 CB 44. No basis has been shown for upsetting the long-standing rule set forth in respondent's own regulations, Regulations 111, Section 29.23 (l)-1.

In the light of all the foregoing, what is the motive of the Commissioner in attempting to reverse established policies?

It seems clear that what the Commissioner is attempting to do in this case is to assert a new definition of "useful life" which, in conjunction with his new definition of "salvage value", would mean that, generally speaking, *taxpayers would not be able to avail themselves of capital gains* upon the sale of business assets under Section 117(j) of the 1939 Code.

Respondent in his deficiency notice (R. 12) originally contended that any gain realized by petitioner from the sale of his automobiles was includible in petitioner's returns not as capital gains, as reported by petitioner, but as ordinary income—on the theory that petitioner was a dealer in automobiles. In his brief before the Tax Court, respondent abandoned that contention and conceded the petitioner's right, under Section 117(j) of the 1939 Code, to treat sales of his automobiles as sales of property used in petitioner's trade or business, not held primarily for sale to customers in the ordinary course.

That concession is meaningless if this Court accepts the respondent's new definitions of useful life and salvage value. Petitioner submits that this concession confirms that respondent's argument in this case is designed to achieve the informal repeal of Section 117(j) and its successor provision in the 1954 Code, Section 1231. Indeed, respondent's counsel admitted as much at the hearing before the Tax Court when he stated:

> " . . . our position is somewhat in the alternative because we have adjusted the useful life and we have adjusted the depreciation and in taking that action we have cut down the amount of gain or profit considerably." (R. 40.)

Respondent's true objective here is to defeat the application of Section 117(j) and, in defiance of Congressional purposes, to prevent the realization of capital gains thereunder. If that result cannot be effected in any other way, then it must be done by way of eliminating any recovery beyond cost, upsetting the accepted definition of useful life, imposing an arbirtary salvage value limitation upon the taking of depreciation—*anything* to defeat the express statutory mandate that gains on the sale of business property shall be taxed at capital gains rates.

In the light of the legislative history subsequent to enactment of Section 117(j), it is astonishing to see the Commissioner continuing his efforts arbitrarily to nullify that Section. Section 117(j) of the 1939 Code was carried through into Section 1231 of the 1954 Code, so that in 1954, Congress, reaffirming twelve years of experience with the former statute, again provided for capital gains treatment of profits resulting from the sale of depreciable property used in the taxpayer's trade or business and held for more than six months. Congress made it clear that its earlier provision in the 1939 Code for capital gains treatment of profits on the sale of business property was not being disturbed. Page A275 of House Report No. 1337, 83rd Cong., 2d Sess., states, with respect to Section 1231:

> "This section is derived from section 117(j) of present law. There is no substantive change intended but some rearrangement has been made."

During the extensive Revenue Revision hearings held by Congress in 1947 and 1948, the Business Tax Section of the Division of Tax Research of the Treasury Department submitted a report on accelerated depreciation to the Ways and Means Committee of the House of Representatives ("Revenue Revisions, 1947-1948", hearings of December 2-12, 1947, Part 5, page 3756), in which the Treasury Department *attempted to reduce the effect of the capital gains section* in the 1939 Code [Section 117(j)]:

> "[A] danger is that accelerated depreciation allowances might be used to convert ordinary income into capital gains, since a businessman might sell a fully depreciated asset that still had a substantial value, paying a tax on the capital gain and avoiding the taxes on its income that were deferred during the period of accelerated depreciation. This type of avoidance could be overcome by requiring that if the taxpayer elects to use accelerated depreciation, gain to the extent of the excess of accelerated over normal depreciation must be treated as ordinary income."

That was an initial attempt by the Treasury Department to attack the benefits of capital gains treatment of profits realized from the sale of assets subject to depreciation. The attempt failed because the philosophy of Congress was to encourage capital investment, to encourage the sale of capital assets and thus to encourage the purchase of new capital assets.

Shortly thereafter, the Treasury Department took a different approach in its attack on Section 117(j). It recommended to Congress in 1950 that losses on the sale of depreciable business property be treated as capital rather than ordinary losses. This recommendation was rejected. (See committee reports on H.R. 8920, 81st Cong., 2d Sess.)

Still another attempt by the Treasury Department to eliminate capital gains in connection with the sale of depreciable property came some time ago when the Treasury Department apparently decided that, having lost its battle in Congress, it would nevertheless try to get the same result in another way—by attempting to disallow capital gains in this type of case by contending, under Section 117(j) of the 1939 Code, that the assets in question were held "primarily for sale to customers in the ordinary course of [taxpayer's] trade or business" and thus were ineligible for capital gains treatment under that Section.

That attempt also failed. That approach was closed off by the courts in *Philber Equipment Corporation* v. *Commissioner of Internal Revenue,* 237 F. 2d 129 (C.A. 3rd, 1956), and also in *Massey Motors, Inc.* v. *United States,* 156 F. Supp. 516 (D.C.S.D. Fla., 1957), which we have discussed above, at pages 21-23. In subsequent cases, apparently the Treasury Department has simply dropped its contention that vehicle renters or lessors are dealers in automobiles; and, as noted above, respondent eventually abandoned that issue in this case.

However, the Commissioner apparently believes that he may have found another approach, a back door through which he may be able to strike down or substantially impair capital gains treatment of profits from the sale of depreciable business assets. That new-found way, in the case of business automobiles, is to claim that the useful life of such automobiles is not the usual and accepted period of four years, but whatever may turn out to be the holding period of the particular taxpayer under examination. With the imposition of this definition of useful life, and with salvage value arbitrarily defined as meaning whatever the taxpayer happens to get for an automobile at the end of a year and a half or two years, there is relatively little asset value subject to depreciation and there is no capital gain.

Moreover, we submit the following as one of the most significant items in the legislative history of this subject: When Congress was debating the 1954 Code, the question of capital gains on the sale of business property was specifically brought to the attention of Congress by the Committee on Federal Taxation of the American Institute of Accountants. On April 19, 1954, that group filed with the Senate Finance Committee its Recommendation No. 180 with respect to Section 1231 (Hearings before the Committee on Finance, United States Senate, 83rd Cong., 2d Sess., on H.R. 8300, Part 3, page 1324), as follows:

> "Gain or loss on property used in the trade or business, etc., should be treated uniformly as ordinary income or loss."

That recommendation was heard and disregarded. In fact, in the face of that recommendation to cut off capital gains on the sale of business property, Congress re-enacted in 1954 the same capital gains principle as had previously been enacted in Section 117(j) of the 1939 Code.

In view of Congress's clear intention, we submit that respondent in the case at bar is obviously trying, by attempted administrative legislation, to do what Congress refused to do when that very question was specifically put before it.

In this connection, it is interesting that Congress did see fit, in connection with rapid amortization of emergency facilities (Section 168 of the 1954 Code [formerly Section 124A of the 1939 Code] and Section 1238 of the 1954 Code [formerly Section 117(g)(3) of the 1939 Code]) to limit capital gains on sales of emergency facilities amortized under Section 168.

But Congress did not enact any capital gains limitation in connection with its enactment of Section 23(l)—the section here involved.

It seems probable that if this Court should affirm the deficiencies determined below, any taxpayer reporting gain on the sale of a depreciable asset under Section 117(j) or Section 1231 may expect to be met with the claim that the particular holding period and the particular selling price established the useful life and salvage value which should have been used in the depreciation account in the first instance. The practical result would be the effective administrative repeal of Section 117(j) and Section 1231, in disregard of the clearly expressed intention of Congress.

Whether the policies implemented by those Sections are to continue to govern taxpayers is an issue for Congress, not the respondent or the Tax Court, to decide.

IV.

The three decisions cited by the Tax Court, in its opinion below, do not support its conclusion.

The opinion of the Tax Court, cast in memorandum form (reported at 16 TCM 639) not only ignored the firmly established legal interpretation and administrative practice summarized above, but also, in view of the absence of meaningful legal analysis or authority, appears simply to have adopted and assumed the correctness of the novel theory of the respondent. The Tax Court completely ignored petitioner's arguments, as evidenced not only by its failure to discuss them in any way in its opinion, but by its failure to mention a single one of the many authorities (statutes, regulations, cases, rulings and items of legislative history) cited by petitioners in their briefs (see Dickinson, "Useful Life and Salvage Value: Changing Concepts," 7 Drake L. Rev. 32 [December, 1957]).

The Tax Court merely *assumed, without discussion,* that petitioner's average holding period of, and average sales proceeds from, his automobiles during the particular years in controversy constituted, respectively, their useful life and salvage value. In so holding, the Tax Court rejected the entire past development of principles underlying the depreciation deduction without even an acknowledgment of the fact that those principles were at stake.

The Tax Court appears to have been unaware of, or to have merely ignored, the basic issues and the revolutionary change in concepts embodied in its simple acceptance of respondent's position herein. This acceptance amounts to establishment of a far-reaching principle without any meaningful analysis of the issues at bar.

In its memorandum decision, the Tax Court made the following finding of fact:

> "The surplus automobiles sold by Robley [petitioner] could have been used longer than they were; . . . " (R. 28)

This finding of fact by the Tax Court clearly raised a question of *law* which should have been considered by that court in its opinion. That question of law has been presented to this Court, and may be briefly restated here: As a matter of law, does the term "useful life" for depreciation purposes mean the period during which a particular taxpayer holds a business asset or does it mean the physical life of such asset? *In its opinion, the Tax Court did not consider this question of law raised by its own finding of fact.*

In reaching what we believe to be an unreasoned and in fact unreasonable conclusion with respect to this pure question of law, the Tax Court cited without discussion only three decisions. None of these, we submit, is in point. Indeed, instead of supporting the propositions necessary to sustain the Tax Court's decision, they are consistent with the traditional definitions applied by the petitioner in computing depreciation during the taxable years in issue.

The first case cited by the Tax Court is the Supreme Court's decision in *United States* v. *Ludey,* 274 U.S. 295 (1927) (R. 31). This case dealt solely with the determination of the correct basis for gain or loss on the sale of oil-producing property, including equipment used in connection with the production of oil from such property. The decision was cited by the Tax Court only because it gave, in passing, a judicial expression to the depreciation formula found in the Commissioner's regulations since 1918.

To bring more clearly into focus the context in which the Supreme Court was applying that formula, we need only refer to the language of the Court found at page 301:

> "The theory underlying this allowance for depreciation is that by *using up* the plant a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold. When the plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties. Any other construction would permit a double deduction for the loss of the same capital assets." (Emphasis added.)

Preceding the above-quoted portion of the Supreme Court's opinion, the Supreme Court had said in the same paragraph (page 300):

> ". . . The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through *wear and tear* of the plant used. . . ." (Emphasis added.)

This statement of the Court, quoted above, clearly relates depreciation to a physical life, a physical using up of the asset, and furnishes no support to the respondent's theory.

The Tax Court also cites in its opinion herein *Leonard Refineries, Inc.,* 11 TC 1000 (1948), Acq. 1949-2 CB 2 (R. 31). In that case, taxpayer attempted to increase its excess profits tax credit (computed under the income method) by decreasing its depreciation allowance for a base period year. It was taxpayer's position that certain desalting equipment, which it began to use two years after it set up its schedule for depreciating its refinery equipment, would

extend the term of the physical or useful life of the refinery equipment. The Tax Court rejected this claim only because the taxpayer failed to prove that the use of a desalter lengthened the *physical life* of the refinery equipment. Thus, even while rejecting the taxpayer's claim for lack of evidence, *the Tax Court was defining the term "useful life" as does petitioner herein—as physical or economic life*—stating, at page 1008:

> "We do not think the fact that a desalting unit was effectively operating at the Alma plant in 1938 makes the 1940 depreciation rates on the six classes of assets unreasonable simply because this factor was not considered in originally fixing these rates. There is no evidence that such a machine *prolonged* the useful lives of either nonproduction assets or production equipment which did not come into *actual contact* with the crude oil. Further, the desalter had no effect on the sulphur compounds in the Michigan oil, which were the most important corrosive element. We have no basis in the facts for calculating how much it *reduced the total corrosion* inherent in the refining process . . . ." (Emphasis added).

The second issue in that case confirms again the proper definition of the term "useful life". That issue involved the contention of the taxpayer that it was entitled to take depreciation on certain assets based on *the physical lives of those assets* rather than over the term of a particular lease. On this issue, the Tax Court stated, at page 1009:

> ". . . We hold that the depreciation rates for 1939 and 1940 should have been based on *the physical lives* of these assets because of circumstances known to petitioner on March 31, 1939, the close of the fiscal year 1939." (Emphasis added.)

With respect to both issues involved in the *Leonard Refineries* case, the Tax Court explicitly equates useful life with physical life. It is clear, therefore, that this case, cited by the Tax Court below, is not authority for the holding of that court.

The only other case cited in the Tax Court's opinion is *J. W. McWilliams,* 15 BTA 329 (1929), Acq. VIII-2 CB 34 (R. 33). It is cited at the end of that opinion, and appears to be intended to buttress the position taken by the Tax Court that the useful life of petitioner's automobiles is equivalent to petitioner's holding period, and that salvage value is equivalent to the proceeds realized from the sale of petitioner's automobiles at the end of that holding period. No such authority can be found in or implied from the *McWilliams* case. Indeed, this case supports petitioner's position and the established practice.

Two depreciation issues were involved in the *McWilliams* case. The first concerned a lumber mill which had a physical or economic life of ten years. Unfortunately, it was located in a timber tract where all of the lumber would be exhausted in six and one-half years, which the taxpayer claimed was its useful life. The Board of Tax Appeals might have said that useful life, for purposes of computing depreciation on the mill, was the period of anticipated actual use by the taxpayer (the respondent's position in the present case); instead, the Board *ignored the taxpayer's period of anticipated use* and utilized the inherent physical or economic life of the mill. The Board specifically rejected a useful life based upon the likelihood that the adjacent timber would be exhausted within a given period, stating:

> "We have found that the *physical life* of the mill and plant was 10 years. . . .
>
> ". . . We can not say that the plant will not operate its full 10 years of life. . . . We hold an allowance of 10 per cent for depreciation for the years 1920 and 1921 to be reasonable and proper." (15 BTA, at 339, 340; emphasis added.)

The Board specifically rejected, as a test for useful life, the period of probable actual use of the property by the taxpayer, and employed instead the physical life of the

property. The Board reasoned that adverse market conditions might require the taxpayer to use the property for its full physical life.

In the case at bar, petitioner was governed not only by market conditions in determining his holding periods, but also by many other factors affecting his holding period of automobiles. These factors included competitive developments, technical improvements of automobiles, the possibility of war and restricted automobile production, lease term duration and variations in automobile supply (R. 65, 66, 69, 71). These factors were unpredictable at the time petitioner acquired his automobiles, and were clearly beyond his control. The rationale of the Board's decision in the *McWilliams* case, where only one unpredictable factor was involved, is even more forcefully present in the petitioner's case.

The Board was also called upon to decide in the *McWilliams* case an issue involving the depreciation of taxpayer's business automobiles. The meaning of the terms "useful life" and "salvage value" was not involved in that issue. The Board simply had to determine the amount and annual allocation of the depreciation allowable on automobiles which were acquired and traded in during a four-year period. The taxpayer did not maintain any depreciation schedules for the automobiles while he owned them; consequently, there was not available to the Board any of the customary depreciation data. Under the circumstances, the Board allowed depreciation on the basis of the initial cost of the original two cars, plus subsequent cash payments for new cars, less the resale value of the last car used, prorated over the years of the business's use of the automobiles. The Board specifically pointed out that it had no alternative, since no evidence had been introduced as to proper depreciation, and *limited its holding to the situation where no depreciation schedules were maintained,* stating, at p. 345:

> ". . . *In the absence of evidence as to just when the exchanges of cars were effected and the details of those transactions,* we hold that the total of this *exhaustion* should be apportioned ratably over such period. . . . " (Emphasis added.)

The Board in the *McWilliams* case, it should be noted, referred to depreciation as a process of *exhaustion,* that is, a process of physical consumption of property. Further, the Board stated, at page 344:

> ". . . The record shows that beginning early in 1920 petitioner used exclusively for business purposes two automobiles which he had purchased. It follows that actual depreciation sustained upon these automobiles as a result of this business use, if it can be determined, is a proper deduction from gross income as *wear and tear* on assets used in trade or business. . . ." (Emphasis added.)

We submit that this analysis of the three decisions cited by the Tax Court in its opinion below demonstrates that those decisions not only do not support the conclusion reached by the Tax Court, but actually support the position taken by the petitioner herein.

Continuing our analysis of the Tax Court's opinion below, we shall next review it in the light of the statute and the regulations in effect for the taxable years in issue.

The position taken by the Tax Court below, substituting a test based on petitioner's holding period and his assumed intent for a test based on physical exhaustion, wear and tear, is inconsistent with the language of Section 23(l) of the 1939 Code and the respondent's regulations thereunder, particularly Regulations 111, Section 29.23(l)-1, in which respondent states:

> "A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, . . . may be deducted from gross in-

> come. For convenience such an allowance will usually be referred to as depreciation, *excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. . . .*'' (Emphasis added.)

An analysis of the Tax Court's opinion and the respondent's position will demonstrate the above-mentioned inconsistency. The test applied by the Tax Court below did not conform to the test set out in the 1939 Code and the regulations. The test of the Code and regulations is based on the annual loss of value resulting from exhaustion and wear and tear, which are physical facts, but the Tax Court instead adopted for depreciation purposes a test based on the mere *loss in market value* during the period petitioner held his automobiles, contrary to such cases as *Reginald Denny,* 33 BTA 738 (1935). Under the theory of the Tax Court's opinion in the case at bar, the starting point in determining the amount of depreciation allowable is the amount realized by petitioner on the disposition of his automobiles. However, it is clear that the amounts realized by petitioner on the disposition of his automobiles were not determined by the physical facts of the exhaustion and wear and tear of his automobiles. They were basically determined by reference to the automobile dealers' handbook of values (N.A.D.A. book), which is revised monthly (R. 58, 60.) The amounts realized by petitioner were merely whatever happened to be the market values at a particular period of time in the physical life of the cars.

After reducing petitioner's cost by the amount he realized on resale of his automobiles, the Tax Court directs that the resulting balance be deducted over the term of petitioner's holding period as a depreciation allowance. That, says the Tax Court, is the measure of petitioner's depre-

ciation. This whole concept, we submit, is merely an application by the Tax Court of the test *prohibited* under the applicable regulations: the deduction as depreciation of an amount which represents the mere loss in market value *without regard to* the exhaustion or wear and tear of the asset.

Conclusion.

In summary, petitioners' position is that the testimony in this case, the decisions in tax cases directly in point, and the Commissioner of Internal Revenue himself in his own pronouncements—all lead to these conclusions:

(1) that petitioner's automobiles have a useful life determined by the period of their physical usefulness for business purposes and a salvage value determined by their residual or scrap value at the end of such period;

(2) that a four-year useful life and a nominal scrap value are established by the record in this case; and

(3) that the decision of the Tax Court has no support in the record or in the decisions for applying different definitions and deriving different figures for the useful life and salvage value of petitioner's automobiles.

Petitioners respectfully request that the Tax Court's conclusions herein with respect to allowable automobile depreciation during 1950 and 1951 be reversed and that the

depreciation allowance claimed on petitioners' returns for those years be sustained.

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APPENDIX A

Statute and Regulations Involved.

Section 23(l), 1939 *Code* (*Title* 26, *United States Code, Section* 23[l]):

"In computing net income there shall be allowed as deductions:

* * *

"(l) DEPRECIATION.—A reasonable allowance for the exhaustion, wear and tear (including a reasononable allowance for obsolescence)—

"(1) of property used in the trade or business, or

"(2) of property held for the production of income. . . ."

[*Note*: The remainder of Section 23(l) deals with allocation of depreciation between life tenant and remainderman and between income beneficiaries and trustee, and has been omitted because it is not relevant to the issues herein.]

Regulations 111, *Section* 29.23(l)-1:

"Depreciation.—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable

property, equal the cost or other basis of the property determined in accordance with section 113. Due regard must also be given to expenditures for current upkeep. . . . ''

[*Note*: The remainder of this section deals with allocation of depreciation between life tenant and remainderman and between income beneficiaries and trustee, and has been omitted because it is not relevant to the issues herein.]

APPENDIX B.

Record References To Exhibits.

(Pursuant to Rule 18[2][f] of the Rules of the United States Court of Appeals for the Ninth Circuit.)

Exhibit	Identified, Offered and Received in Evidence at Record Page
Petitioner's Exhibit 5	[Not referred to in printed record.]
Petitioner's Exhibit 9	44
Petitioner's Exhibit 10	56, 57
Petitioner's Exhibit 11	56, 57
Petitioner's Exhibit 12	68
Respondent's Exhibit A	[Not referred to in printed record.]
Respondent's Exhibit B	
Respondent's Exhibit C	
Respondent's Exhibit D	
Respondent's Exhibit E	
Respondent's Exhibit F	

No. 15985

In the United States Court of Appeals for the Ninth Circuit

ROBLEY H. EVANS and JULIA M. EVANS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 24-33) are not officially reported.

JURISDICTION

The petition for review (R. 93-96) involves deficiencies in income tax for the years 1950 and 1951 in the respective amounts of $13,191.52 and $13,048.12. Taxpayers' income tax returns for 1950 and 1951 were filed with the Collector of Internal Revenue for the District of Washington. (R. 21, 26.) On March 9, 1955, the Commissioner mailed a notice of deficiency to the taxpayers advising them of deficiencies in income tax totalling $82,361.66.

(R. 9-17, 21.) Within 90 days thereafter, on May 31, 1955, taxpayers filed a petition for redetermination of the deficiency under Section 272 of the Internal Revenue Code of 1939. (R. 3-9, 17.) On February 7, 1958, the Tax Court entered its decision, finding deficiencies in income tax for the years 1950 and 1951 in the respective amounts of $13,191.52 and $13,048.12.[1] (R. 34.) The case is brought to this Court by a petition for review filed by the taxpayers on March 10, 1958. (R. 93-96.) Jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether, under Section 23(l) of the Internal Revenue Code of 1939 as applied to the particular facts of this case, the Tax Court was correct in holding that "a reasonable allowance" for depreciation on automobiles used in the taxpayer's business is provided by computing the depreciation in accord with taxpayer's well-established business experience and practice, *i.e.*, depreciation of the automobiles over their useful life in the taxpayer's business, taking into consideration in such computation as salvage value the considerable resale value which taxpayer recovers at the termination of the properties' useful life in his business.

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[1] In the Tax Court, the taxpayers conceded that certain of the adjustments made by the Commissioner were correct, and the Commissioner also conceded that certain of his adjustments were improper. The only issue left for decision arose from the Commissioner's partial disallowance of claimed depreciation deductions.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations are set forth in Appendix A, *infra.*

STATEMENT

A portion of the facts was stipulated. (R. 20-24.) The findings of the Tax Court (R. 26-30), which must be accepted as the facts of the case unless shown to be clearly erroneous, may be summarized as follows:

The taxpayers, Robley H. Evans and Julia M. Evans, are husband and wife, residing in Bellevue, Washington. (R. 26.)

During the years 1950 and 1951, Robley H. Evans (hereinafter called the taxpayer)[2] was engaged in the business of leasing automobiles in the vicinity of Seattle. He has been in that business as a proprietor since 1936. During 1950 and 1951, taxpayer leased all of his automobiles to Evans U-Drive, Inc. (hereinafter referred to as U-Drive), a corporation, at the rate of $45 per month per automobile. Taxpayer was the manager of U-Drive. (R. 26.)

The lease agreement between taxpayer and U-Drive provided that taxpayer would furnish and lease to U-Drive a sufficient number of automobiles to efficiently operate and conduct an automobile rental business. Taxpayer retained title to the automobiles, and had the right to sell and dispose of any of the automobiles at any time. U-Drive agreed to pay all expenses of maintenance and repair of the automo-

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[2] Julia M. Evans is a party solely because of the filing of joint returns for the two taxable years involved, *i.e.*, 1950 and 1951.

biles, and also to keep the automobiles insured against liability for personal injury or property damage. U-Drive also assumed the risk of loss or damage. A supplemental agreement dated December 1, 1951, gave U-Drive an option to purchase any automobile in its possession at any time, for the actual cost of the automobile to taxpayer. (R. 26-27.)

U-Drive engaged in two types of activity during the taxable years. It leased about 30 to 40 per cent of its automobiles to customers for long periods of time, *i.e.*, 18 to 36 months, and it rented the remainder of its automobiles to the general public on a short-term basis, *i.e.*, for a few hours, a few days, or a few weeks. (R. 27.)

Taxpayer normally kept a supply of Chevrolet, Ford and Plymouth automobiles on hand, which he purchased new from local automobile dealers, usually at the factory price. He endeavored to maintain a modern fleet of rental automobiles as this was necessary to meet the demands of U-Drive's leasing and rental business. (R. 27.)

Taxpayer periodically owned more automobiles than were necessary for the efficient operation of U-Drive's short-term rental business. When this situation occurred, he would examine the cars in use and would sell those that were not needed. The oldest and least desirable automobiles were sold first. When sold, the automobiles usually had been driven an average of 15,000 to 20,000 miles and were generally in good mechanical condition. Many automobiles were sold at the end of the tourist season, *i.e.*, after Labor Day. (R. 27-28.)

At the termination of U-Drive's extended period

leases, the automobiles would be returned to taxpayer who would sell them. When sold, the automobiles might have been driven up to 50,000 miles. They were usually in good mechanical condition and state of repair at the time of sale. (R. 28.)

The surplus automobiles sold by taxpayer could have been used longer than they were; however, customers demanded late model automobiles that were currently in style. Older automobiles did not have much value as rental vehicles. During the taxable years, taxpayer sold the automobiles used by U-Drive in the short-term rental phase of its business after they had been used about 15 months. And he usually sold the automobiles which had been leased for extended periods as soon as the lease was terminated. If a new lease was executed, a new car was usually provided for the lessee. (R. 28.)

Taxpayer sold most of his surplus automobiles to used car dealers, jobbers, or brokers. As a general rule, the automobiles were sold at current wholesale prices. Taxpayer did not advertise the sales of his automobiles nor did he maintain a showroom or any other retail facilities for sale of his surplus automobiles. (R. 28.)

Taxpayer's tax returns for 1950 and 1951 disclosed that he sold 140 and 147 automobiles, respectively, in those years. (R. 28.) The average cost, sales price, depreciation claimed, and gain per automobile, were approximately as follows (R. 29):

Year	Cost	Sales Price	Depreciation Claimed	Gain
1950	$1,650	$1,380	$515	$245
1951	1,495	1,395	450	350

Most of the automobiles sold had been held by taxpayer less than 15 months. (R. 29.)

On his tax returns for the years 1950 and 1951, taxpayer claimed depreciation on the automobiles he leased to U-Drive in the respective amounts of $77,972.71 and $92,890.05. These amounts were computed and the deductions claimed on the basis that the automobiles had an estimated useful life of 4 years, with no salvage value at the end of the 4-year period. (R. 29.)

The Commissioner determined allowable depreciation on these automobiles for the years 1950 and 1951 on the basis of an estimated useful life for each automobile of 17 months and a salvage value of $1,325 at the end of the 17-month period, or the amount of undepreciated cost at January 1, 1950, for automobiles in use at that date, if less than $1,325. (R. 29.)

The Tax Court found that the automobiles leased to U-Drive during the taxable years for use under extended-term leases had a useful life of 3 years and a salvage value of $600. However, if the undepreciated cost of such automobiles in service at January 1, 1950, was less than $600, then that amount would be the salvage value of those automobiles. (R. 29.)

The Tax Court further found that the automobiles leased to U-Drive during the taxable years for short-term rental use had a useful life of 15 months and a salvage value of $1,375. However, if the undepreciated cost of such automobiles in service at January 1, 1950, was less than $1,375, then that amount would be the salvage value of those automobiles. (R. 30.)

SUMMARY OF ARGUMENT

Section 23(l) of the Internal Revenue Code of 1939 permits the deduction from gross income of "A reasonable allowance for the exhaustion wear and tear (including a reasonable allowance for obsolescence) * * * of property used in the trade or business, * * *." The basic and sole standard which Congress has laid down in Section 23(l) is the requirement that the annual depreciation deduction *reasonably* reflect that portion of the value of capital assets consumed in earning the gross income for the taxable year. Section 23(l) does not provide for an inflexible method or system of computing a reasonable depreciation deduction, but rather requires its determination in such fashion as will conform to the circumstances of the depreciated property and the enterprise within and for which the property is used. Clearly, a reasonable allowance for depreciation, within the revenue laws, depends upon the particular facts of each case.

In keeping with the purpose of the depreciation deduction and the established rules regarding its computation, the Commissioner contends that, for the purpose of computing a reasonable depreciation allowance pursuant to Section 23(l), the estimated useful life over which an asset is to be depreciated by a taxpayer is not necessarily the useful life inherent in the asset, and in the present case is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business. Similarly, it is submitted that salvage value, as that term is used in the Treasury Regula-

tions interpreting Section 23(l), means the amount (determined at the time of acquisition) which it is reasonable to estimate will be realizable upon the sale or other disposal of the asset when it is no longer useful in a taxpayer's business and is retired from service.

Under the particular facts of this case, in which obsolescence is an important factor, the Tax Court was clearly correct in determining that a reasonable deduction is allowed taxpayer, for the taxable years 1950-1951, by computing the depreciation of his automobiles upon the basis of their useful life in his business as a lessor of rental-cars, and in taking into consideration in such computation, as salvage value, the substantial resale value which the cars possess in the used car market, and which taxpayer recovers upon the sale of the automobiles after they are no longer useful in his business. The Tax Court was correct in rejecting taxpayer's scheme of depreciating his automobiles upon the basis of their alleged inherent physical life, taking into consideration no salvage value, or possibly only a nominal scrap or junk value, since such a computation of depreciation is not in accord with the facts of this case and thus results in an unreasonable depreciation deduction which substantially distorts the taxpayer's net income subject to tax.

Numerous judicial decisions construing and applying Section 23(l), and the Treasury Regulations and Bulletin "F" interpreting that section, support the Tax Court's determination that the estimated useful life of taxpayer's automobiles for purposes of depre-

ciation is not the inherent physical life of the automobiles, but is the period over which the automobiles may reasonably be expected to be useful to the taxpayer in his trade or business; and that salvage value is the amount which it is estimated will be realizable upon the sale of the automobiles when they are no longer useful in the taxpayer's business. There is substantial evidence in this record which supports the Tax Court's findings that, during the two years involved, the taxpayer's automobiles, when used for short-term rental purposes in his business, had an estimated useful life of fifteen months and a salvage value of $1,375; and when used for extended-term lease purposes in his busines, had an estimated useful life of three years and a salvage value of $600.

The depreciation deduction which the Tax Court's opinion allows to the taxpayer is in full accord with Section 117(j) of the 1939 Code, which permits capital gain upon the sale or exchange of certain property used in trade or business. Section 117(j) must be interpreted and applied in conjunction with Section 23(l)'s allowance of a reasonable depreciation deduction, since the cost basis which is used to determine capital gain under Section 117(j) is the original cost of the asset less the depreciation deducted therefrom. The effect which the Tax Court's opinion has upon taxpayer's capital gains stems solely from the fact that the court has followed Congress' direction to permit the deduction of only a reasonable allowance for the exhaustion, wear, tear and obsolescence of taxpayer's automobiles during the taxable years involved.

ARGUMENT

The Tax Court Correctly Computed Taxpayer's Depreciation Allowance, Under Section 23(l) of the Internal Revenue Code of 1939, On the Automobiles Used In His Car-Rental Business.

A. *Basic Principles.*

Section 23(l) of the Internal Revenue Code of 1939 (Appendix A, *infra*) permits, as a deduction in computing net income:

> A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
>
> (1) of property used in the trade or business, or
>
> (2) of property held for the production of income.

Thus, the statute authorizes the deduction of a *reasonable* allowance for depreciation. It is our position that, as the Tax Court held, a reasonable allowance on the automobiles used in taxpayer's business results only when the allowance is computed with reference to taxpayer's long-standing and well-established business experience and practice as a lessor in the car-rental business and, accordingly, that his depreciation deductions for the taxable years are to be computed on the basis of the estimated actual depreciation in the cars over their useful life *in taxpayer's business*, taking into account the estimated resale value of the cars at the end of that period. Taxpayer is not entitled to convert ordinary income into capital gain through the depreciation deduction.[3]

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[3] By ignoring the purpose of the depreciation expense deduction and the well-established rules governing its use,

Because of the nature of taxpayer's business, it is clear that obsolescence, rather than physical exhaustion, was the principal factor in the depreciation of

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taxpayer attempts to place himself in the anomalous position of being able to substantially reduce his income tax by substantially increasing his gross income. Strictly speaking, taxpayer reduces his net ordinary income by taking an unduly large depreciation deduction which, due to the fact that taxpayer consistently uses his automobiles for only a short period of time and recovers a large portion of their value upon their disposal to used car dealers, sets the stage for a large capital gain upon the sale of the excessively depreciated automobiles. An illustration of this procedure in operation can be given by using the findings of the Tax Court based on taxpayer's tax returns for the years 1950 and 1951. (R. 26, 28-29.) The following figures are approximate averages:

Year	Ordinary Income Per Car Over a 15-month Period	Depreciation Deduction Per Car Claimed	Cost Per Car	Sales Price Per Car
1950	$ 675	$ 515	$ 1,650	$ 1,380
1951	$ 675	$ 450	~~$ 1,459~~ $ 1,495	$ 1,395

Actual Decrease In Value Per Car To Taxpayer	Capital Gain Per Car Claimed	Cars Sold
$ 270	$ 245	140
$ 100	$ 350	147

As this case indicates, the tax which taxpayer pays on the capital gain at the low capital gain rate is more than overbalanced by the savings in the tax on his ordinary income which is taxed at the individual ordinary income rates. The key to this device is success in ignoring the resale value, *i.e.*, salvage value, of the cars. To ignore salvage value, taxpayer has to base his depreciation rate, not on the experience in his business, but rather on the hypothetical assumption

most of his automobiles.[4] (R. 7, 69, 79-80.) As the Tax Court found (R. 28), the customers of U-Drive "demanded late model automobiles that were currently in style." (See R. 80.) Thus, in order to remain competitive, taxpayer has found it consistently necessary, at least since 1949, to dispose of the cars used in his business for short-term rental purposes after fourteen to sixteen months' use, and acquire as replacements new current model cars. (R. 46, 80.) Likewise, in the case of extended-term lease cars, it was the taxpayer's consistent practice to provide a new car at the beginning of the lease and dispose of it at the termination of the lease. (R. 64-65.) These leases, and consequently taxpayer's use of those cars in his business, averaged between eighteen and thirty-six months in duration. (R. 45, 80.) Taxpayer has testified and, the Tax Court found, that when taxpayer sold his cars they were generally in good physical condition (R. 27, 54), many "barely 'broken in'" (R. 32). Indeed, Mr. Bernard Verhey, one of the used car dealers who consistently bought

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that he uses his cars for their full physical life, allegedly four years. See Rabkin & Johnson, Federal Income Gift and Estate Taxation, Section 45.01, pp. 4504-4505.

[4] This, of course, is particularly true of the short-term rental cars which were held fourteen to sixteen months in taxpayer's business and constituted between 60 and 70% of all of taxpayer's cars. (R. 27, 79.) As to the extended-term lease cars, which were held by taxpayer between eighteen and thirty-six months, it appears that obsolescence, although important, was less of a factor in the depreciation of the cars, and the Tax Court's opinion takes this fact into account by dealing with the two types of cars separately.

cars from taxpayer, testified that "I found his cars to be in very fine shape." (R. 58.) It was taxpayer's established and continuing practice to sell his cars to used car dealers, jobbers or brokers at the wholesale price for cars in average or above average condition. (R. 47-49, 58-59.)

The basic and sole standard which Congress has laid down in Section 23(l) is the requirement that the yearly depreciation deduction *reasonably* reflect that portion of the value of the capital assets consumed in earning the gross income for the taxable year. *United States* v. *Ludey*, 274 U. S. 295, 300-301; *Virginian Hotel Co.* v. *Helvering*, 319 U. S. 523, 528; Treasury Regulations 111, Sections 29.23(l)-1, 29.23(l)-2, 29.23(l)-5 (Appendix A, *infra*). Section 23(l) also clearly requires that the deduction be based upon and take into consideration depreciation caused by economic forces, *i.e.*, obsolescence, as well as exhaustion of the assets caused by physical wear and tear.[5] *Gambrinus Brewery Co.* v. *Anderson*,

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[5] In Graham and Dodd, Security Analysis, Principles and Technique (2d ed.), p. 485, it is pointed out that to a large extent in practice "the *long term depreciation* factor is in reality overshadowed and absorbed by the *obsolescence* hazard." (Emphases in the original.) Likewise, the authors of Finney and Miller, Principles of Accounting, Intermediate (4th ed.), in examining from an accounting viewpoint the problem of the estimated life of tangible assets for depreciation purposes, state (p. 442):

> Estimating the life of a fixed asset requires consideration of both physical depreciation and obsolescence. The period during which the cost (or other base) should be absorbed in operations should be the probable physical life or the probable life prior to retirement caused

282 U. S. 638, 645; *Becker* v. *Anheuser-Busch, Inc.*, 120 F. 2d 403, 412 (C. A. 8th), certiorari denied, 314 U. S. 625.

The legislative reasoning behind the depreciation deduction is, of course, the determination that the federal income tax should be levied only upon gain and that a reasonable amount allowed to be set aside through the depreciation deduction is not gain, but is capital that has gone into gross income. As the Supreme Court has stated in *Gambrinus Brewery Co.* v. *Anderson, supra*, pp. 642-643:

> The cost of plant depreciation, i.e., exhaustion, wear, tear and obsolescence, is a part of operating expenses necessary to carry on a manufacturing business. The gain or loss in any year cannot be rightly ascertained without taking into account the amount of such cost that is justly attributable to that period of time.
>
> The history of § 234 (a) (7) discloses a legislative purpose that the amount reasonably attributable to each year on account of obsolescence of tangible property used in the taxpayer's business is to be taken into account in ascertaining his taxable income.[6]

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by obsolescence, whichever is less. Plates used in the printing of a book may be in usable condition long after the sale of the book has ceased, but their cost should be charged to operations during the period when sales are made. Patterns and molds, although physically usable for years, may have a life for production purposes only during the manufacture of one annual model.

[6] Sections 234 (a) (7) and 214 (a) (8) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, are respectively depreciation sections for corporate and individual income. Both are predecessor sections of Section 23(l) of the 1939 Code.

See also, *United States* v. *Ludey*, supra, pp. 300-301; *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98, 101-102; *Commissioner* v. *Moore*, 207 F. 2d 265, 275 (C. A. 9th), certiorari denied, 347 U. S. 942; *Union Bleachery* v. *United States*, 73 F. Supp. 496, 502 (W. D. S. C.), affirmed, 176 F. 2d 517 (C. A. 4th), certiorari denied, 339 U. S. 964; *United States* v. *Milnor Corp.*, 85 F. Supp. 931, 938 (E. D. Pa.).

Moreover, it is axiomatic that "In the field of taxation, administrators of the laws, and the courts, are concerned with substance and realities" (*Helvering* v. *Lazarus & Co.*, 308 U. S. 252, 255), and that a reasonable allowance for depreciation, within the revenue laws, depends upon the peculiar facts of each case (*Pittsburgh Hotels Co.* v. *Commissioner*, 43 F. 2d 345, 347 (C. A. 3d)). "The statute [Section 23(l)] does not provide for an inflexible method or system of computing depreciation but appears clearly to allow its determination in such fashion as will conform to the circumstances of the depreciated property and the enterprise within and for which it is owned and used." *Koelling* v. *United States* (Neb.), decided February 14, 1957 (1957 P-H, par. 72, 529).

In the large majority of cases depreciable property is held by taxpayers over its useful *physical* life and there is little question as to the proper depreciation allowance but, where there is a pattern of use of property for a given period and resale at a substantial price at the end of that period, a different method conforming to the facts is required. Depreciation is designed to permit tax-free recovery of that portion of the "unrecovered" cost or other basis of the prop-

erty which may "reasonably be considered necessary." Treasury Regulations 111, Section 29.23(l)-5 (Appendix A, *infra*). Thus, Section 29.23(l)-1 of the Regulations (Appendix A, *infra*), specifically provides that the projer allowance for depreciation is the amount which should be set aside for the taxable year in accordance with a reasonably consistent plan—

> whereby the aggregate of the amounts so set aside, plus the *salvage value*, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113. * * * (Italics supplied.)

Necessarily, in initially setting up the amount of the depreciation allowance, the length of the useful life of the asset and the amount of the salvage value thereof are estimated at the time of the acquisition of the asset upon reasonably predictable conditions. It would obviously be unduly rigid and totally unrealistic, however, to require that, once the original estimate had been made by the taxpayer, the parties would be irrevocably bound thereby in computing the amounts of the subsequent annual depreciation expense allowances.[7] *Terminal Realty Corp.* v. *Commissioner*, 32 B. T. A. 623, 629. Accordingly, it is generally accepted and recognized that the reason-

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[7] Cf. Section 41 of the 1939 Code (26 U. S. C. 1952 ed., Sec. 41) which provides that if the taxpayer's method of accounting does not clearly reflect net income "the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

ableness of the depreciation deduction claimed is to be determined in the light of conditions known to exist at the end of the tax year for which the return is made. *Commissioner* v. *Mutual Fertilizer Co.*, 159 F. 2d 470 (C. A. 5th); *Automatic Cigarette Sales Corp.* v. *Commissioner*, decided January 25, 1955 (1955 P-H. T. C. Memorandum Decisions, par. 55,015), affirmed without discussion of this point, 234 F. 2d 285 (C. A. 4th); *Koelling* v. *United States* (Neb.), decided February 14, 1957 (1957 P-H., par. 72,529); *Leonard Refineries, Inc.* v. *Commissioner*, 11 T. C. 1000, 1006-1007; *Weir Long Leaf Lumber Co.* v. *Commissioner*, 9 T. C. 990, 998, reversed on other grounds, 173 F. 2d 549 (C. A. 5th); [8] Treasury Regulations 111, Section 29.23(l)-5. Cf. *Commissioner* v. *Superior Yarn Mills*, 228 F. 2d 736 (C. A.

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[8] As stated in *Weir Long Leaf Lumber Co.* v. *Commissioner, supra,* p. 998:

> It has long been the rule that depreciation deductions are to be corrected in any year when it is apparent that the factor involving the extent of useful life is erroneous (see *e.g., Washburn Wire Co.* v. *Commissioner* (C. C. A., 1st Cir.), 67 Fed. (2d) 658), and that the reasonableness of a deduction for depreciation is to be determined upon conditions known to exist at the end of the period for which the return is made. Regulations 111, sec. 29.23(1)-5. See *Commissioner* v. *Mutual Fertilizer Co.* (C. C. A., 5th Cir.), 159 Fed. (2d) 470. An adjustment to correct for mistaken salvage value is no different from an adjustment of a mistaken estimate of years of use. In this manner depreciation can be kept to an accurate provision for the return of petitioner's capital investment in the property. This is what the law contemplates. See *Helvering* v. *Virginian Hotel Corporation,* 319 U. S. 523.

4th).[9] The Commissioner is not only authorized but is required by the intent of Section 23(l) of the 1939 Code, the Treasury Regulations, and judicial decisions to determine depreciation on the basis of the facts of the particular business involved. *Detroit Edison Co.* v. *Commissioner*, *supra*, pp. 101-102; *Washburn Wire Co.* v. *Commissioner*, 67 F. 2d 658, 660 (C. A. 1st); *Geuder, Paeschke & Frey Co.* v. *Commissioner*, 41 F. 2d 308, 310 (C. A. 7th); Treasury Regulations 111, Section 29.23(l)-5.

Thus, the Commissioner contends that for the purpose of Section 23(l) the estimated useful life of an asset is not necessarily the useful life inherent in the asset, and that in the present case it is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business, or in the production of income. Likewise, it is submitted that salvage value, as that term is used in the Treasury Regulations and as applied to the present case, means the amount (determined at the time of acquisition) which is estimated will be realizable upon the sale or other disposal of an asset when it is no longer useful in the taxpayer's trade

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[9] In *Commissioner* v. *Superior Yarn Mills, supra* it was held that an allocation of actual cost as between depreciable and non-depreciable property, originally made in 1929 when the property was purchased, could be revised in a later year (1944) in the light of intervening events. Since an adjustment to correct a mistaken *original cost* figure may be justified, *a fortiori* an adjustment made in the light of conditions known to exist at the end of the tax years 1950 and 1951 for a grossly erroneous prediction of useful life and salvage value may be made.

or business, or in the production of his income, and is to be retired from service by the taxpayer.[10]

Contrary to the taxpayer's argument (Br. 12, 19, 31), the Commissioner recognizes that in many factual situations (unlike that in the instant case), where the evidence indicates that an asset will probably be used for its full physical life in a taxpayer's business or where, upon the basis of the taxpayer's business experience and practice, this is the only reasonable prediction which can be made, the estimated useful life of an asset for the depreciation computation will be the physical or inherent life of the asset, and salvage value will be a nominal scrap value. Such a computation, of course, must also be bottomed on a finding that, after taking all the facts into consideration, the computation of depreciation upon the basis of an inherent or physical useful life will not

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[10] The taxpayer incorrectly states (Br. 12) that:

> The Commissioner wishes, rather, to disregard the fact that the asset has years of useful life left after the taxpayer sells it. He wants to lower an iron curtain at the end of the period of the taxpayer's use of the property, and to limit his recognition of "useful life" solely to the partial life of the assets in the hands of the first user.

Of course, when taxpayer's automobiles are resold by the used car dealers, it must be assumed that many of them will be used for personal pleasure and will not qualify for the depreciation deduction. However, as to those cars which are used for business purposes, the cost of the used car, less salvage value, will be subject to the depreciation deduction. Probably in such cases the facts will usually warrant using, as the useful life of the car for depreciation purposes, the remaining physical life of the car.

produce an unreasonable depreciation deduction in the particular case.

The taxpayer here, on the other hand, in effect insists that depreciation is a fixed and frozen concept based upon one rigid formula which, as indicated by this case, may be divorced from the realities of a business.[11] He contends that "useful life" in every case must be considered, for depreciation purposes, as being coterminous with the inherent physical life of an asset for business purposes, and that salvage value necessarily means scrap or junk value at the end of an asset's physical life, in this particular case, computed to be zero.

B. ***In the light of taxpayer's established business experience and practice, the Tax Court was clearly correct in holding that a reasonable depreciation is allowed taxpayer by depreciating the automobiles over their useful economic life in taxpayer's business as distinguished from the physical life of the automobiles.***

1. *The depreciation of taxpayer's automobiles over their useful economic life in taxpayer's business is fully supported by the Treasury Regulations and Bulletin "F".*

As taxpayer recognizes (Br. 12-13), Treasury Regulations 45, Article 161, construing Section 214

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[11] However, in *Detroit Edison Co.* v. *Commissioner, supra,* the Supreme Court, in discussing the purpose of depreciation, has stated that (pp. 101-102):

> The calculation is influenced by too many variables to be standardized for differing enterprises, assets, conditions, or methods of business. The Congress wisely refrained from formalizing its methods and we prescribe no over-all rules.

(a)(8) of the Revenue Act of 1918,[12] c. 18, 40 Stat. 1057, provided:

> The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a consistent plan by which the aggregate of such amounts *for the useful life of the property in the business* will suffice, with the salvage value, at the end of *such useful life* to provide in place of the property its cost, or its value as of March 1, 1913, if acquired by the taxpayer before that date. (Emphases added.)

Similar language was used in the Regulations through Treasury Regulations 103, Section 19.23(l)-1, construing Section 23(l) of the 1939 Code.[13] In Treasury Regulations 111, Section 29.23(l)-1, applicable to years beginning after December 31, 1941, the phrase "in the business" was left out. Taxpayer argues (Br. 13-14) that such omission is an indication that the Commissioner had abandoned the interpretation of "useful life" as set forth in the earlier Regulations and as applied by the Tax Court in this case. Such

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[12] Section 214(a)(8) is substantially similar to Section 23(l) of the 1939 Code.

[13] Treasury Regulations 62, Article 161, Revenue Act of 1921; Treasury Regulations 65, Article 161, Revenue Act of 1924; Treasury Regulations 69, Article 161, Revenue Act of 1926; Treasury Regulations 74, Article 201, Revenue Act of 1928; Treasury Regulations 77, Article 201, Revenue Act of 1932; Treasury Regulations 86, Article 23(l)-1, Revenue Act of 1934; Treasury Regulations 94, Article 23(l)-1, Revenue Act of 1936; Treasury Regulations 101, Article 23(l)-1, Revenue Act of 1938.

an interpretation, however, is clearly incorrect. As a result of the Supreme Court's decision in *Higgins* v. *Commissioner*, 312 U. S. 212, which held that investment management expenses were not deductible under Section 23(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, because not incurred in carrying on any trade or business, Congress enacted Section 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798, which amended Section 23(l) of the 1939 Code by adding "or (2) of property held for the production of income." T. D. 5196, 1942-2 Cum. Bull. 97, 100, clearly shows that:

> In order to conform Regulations 103 [Part 19, Title 26, Code of Federal Regulations, 1940 Sup.] to Sections 121 and 161 of the Revenue Act of 1942 (Public Law 753, Seventy-seventh Congress), approved October 21, 1942, such regulations are amended as follows:
>
> * * * *
>
> Par. 4, Section 19.23(l)-1 is amended as follows:
>
> (A) By inserting after "business" in the first sentence the following:
>
> or treated under section 19.23(a)-15 as held by the taxpayer for the production of income.
>
> (B) By changing the third sentence to read as follows:
>
> The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so

> set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113.

Thus, the only reason for deleting the phrase "in the business" was to give the Regulations broader application, *i.e.*, to depreciation "of property held for the production of income." The Commissioner clearly did not abandon any former interpretation regarding the useful life of property subject to depreciation.

In Section 167 of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 167), Congress authorized several new methods for computing depreciation, as well as certain limitations on the use of those methods. However, Section 167(a) of the 1954 Code, the basic depreciation provision, is, in substance, exactly the same as Section 23(l) as amended by Section 121(c) of the Revenue Act of 1942, the section of the 1939 Code applicable to the tax years here involved. The legislative history of Section 167(a) clearly shows that Congress intended no change as far as the basic depreciation provision set forth in Section 23(l) is concerned.[14] In Treasury Regulations on Depreciation (1954 Code), Section 1.167(a)-1 (T. D. 6182, 1956-1 Cum. Bull. 99), the Treasury Department goes into detail in defining the term "useful life," and emphasizes a taxpayer's own practices as against purely objective physical life ex-

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[14] See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A 48 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4184); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 200 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4835-4836).

pectancies. See Section 1.167(a)-1(b), Appendix B, *infra*. This definition of useful life of property for depreciation purposes, which the Commissioner submits has been his interpretation since Treasury Regulations 45, Article 161, fully supports the decision of the Tax Court in this case.

Further evidence, if any is needed, of a consistent interpretation of the concept of useful life supporting the Tax Court's opinion is contained in Bulletin "F", Bureau of Internal Revenue (Revised January, 1942). In Bulletin "F" it is stated (p. 2):

> The proper allowance for exhaustion, wear and tear, including obsolescence, of property used in trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate) whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of *the useful life of the property in the business*, equal the cost or other basis of the property. In no instance may the total amount allowed be in excess of the amount represented by the difference between the cost or other allowable basis and the salvage value which reasonably may be expected to remain at the end of the useful life of the property in the trade or business. (Emphasis added.)[15]

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[15] The following provisions of Bulletin "F" also support the Tax Court's opinion in this case (p. 3):

> PROBABLE USEFUL LIFE—RATES OF DEPRECIATION AND OBSOLESCENCE
>
> *In general.* The amount of the annual deduction allowable for depreciation is ordinarily dependent upon

Taxpayer points out (Br. 15) that in Bulletin "F" (p. 52) it is stated that the average useful life of an automobile in commercial use is three or five years, depending on the use of the car. It should be noted, however, that the estimated average useful lives listed in Bulletin "F" (Revised January, 1942) are simply

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the expected useful life of the asset. The factors which determine the useful life of property in a trade or business have already been discussed briefly in the introduction. These factors are wear and tear and decay or decline from natural causes; and also various forms of obsolescence attributable to the normal progress of the art, economic changes, inventions, and inadequacy to the growing needs of the trade or business. Two principal forms or types of obsolescence are generally recognized, that is, normal obsolescence and extraordinary or special obsolescence.

Normal obsolescence is caused by factors which can be anticipated with substantially the same degree of accuracy as other ordinary depreciation factors, such as wear and tear, corrosion or decay. Accordingly, it is included in estimating the normal useful life of depreciable property, the effect of which is to include the allowance for normal obsolescence in the depreciation deduction.

* * * *

Past experience, which is a matter of fact and not of opinion, coupled with informed opinion as to the present condition of the property, and current developments within the industry and the particular trade or business, furnish a reliable guide for the determination of the useful life of the property. Such a determination should reflect all the peculiar circumstances of the use or operation of the property, such as the purpose for which it is utilized, the conditions under which it is used or operated, the policy as to repairs, renewals, and improvements, and the climatic and other local conditions.

the result of engineering studies conducted prior to January, 1942, based upon "average" conditions in an industry. They are simply rules of thumb. The provisions of Bulletin "F" referred to herein clearly show that in applying the average useful lives one must also take into consideration the particular facts and circumstances of the individual case.[16] As we have pointed out, the economic usefulness of automobiles in taxpayer's business was unusually short.

Taxpayer also relies on an office decision and two revenue rulings of the Internal Revenue Service. (Br. 14, 16-17.) The general proposition quoted from O. D. 845, 4 Cum. Bull. 178 (1921), supports the Tax Court's opinion.[17] In reading the office decision, tax-

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[16] It should be noted that the title page of Bulletin "F" (Revised January, 1942) states that the bulletin—

> does not have the force and effect of a Treasury Decision and does not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.
>
> Taxpayers and officers of the Bureau are cautioned against reaching conclusions in any case solely on information contained herein and should base their judgment on the application of all pertinent provisions of the law, regulations, and other Treasury Decisions to all the facts in any particular case. The estimated useful lives and rates of depreciation indicated in this bulletin are based on averages and are not prescribed for use in any particular case. They are set forth solely as a guide or starting point from which correct rates may be determined in the light of the experience of the property under consideration and all other pertinent evidence.

[17] O. D. 845, 4 Cum. Bull. 178 (1921), actually deals with the depreciation of buildings under construction.

payer overlooks the fact that his cars were acquired for rental-car purposes and have a short useful life in that business. As for Rev. Rul. 108, 1953-1 Cum. Bull. 185, and Rev. Rul. 54-229 1954-1 Cum. Bull., 124, those rulings deal with "Gains and losses from involuntary conversions and from the sale or exchange of certain property used in the trade or business." It should be noted that, contrary to taxpayer's assertion (Br. 16), Rev. Rul. 108, only inferentially deals with depreciation, and Rev. Rul. 54-229 does not deal with that issue at all. We submit that the Commissioner's use of the term "useful life" when dealing with a different legal issue sheds no light on the question presented by this case.

2. *The depreciation of taxpayer's automobiles over their useful economic life in taxpayer's business is fully supported by judicial decision.*

The basic principles of depreciation upon which the Tax Court based its opinion in this case have long been established in tax law. In the case of *United States* v. *Ludey*, 274 U. S. 295, which deals, in part, with the depreciation and depletion deduction,[18] the Supreme Court stated (pp. 300-301):

> The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant

[18] Contrary to the taxpayer's contention (Br. 38), the nature and purpose of the depreciation deduction was briefed and argued in the *Ludey* case, No. 289, October Term, 1926.

> used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, *at the end of the useful life of the plant in the business*, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. (Emphasis added.)

The term "useful life" of an asset, for purposes of depreciation, was also stated to mean the useful life of the asset "in the business" in *Burlington Gazette Co.* v. *Commissioner*, 75 F. 2d 577, 578 (C. A. 8th); *Cameron* v. *Commissioner*, 56 F. 2d 1021, 1023 (C. A. 3d); *Becker* v. *Anheuser-Busch, Inc.*, 120 F. 2d 403, 412 (C. A. 8th), certiorari denied, 314 U. S. 625. In the recent case of *Cohn* v. *United States* (W. D. Tenn.), decided February 25, 1957 (1957 P-H par. 72,573), on appeal C. A. 6th, the rate of depreciation of certain flying-school equipment was involved. Due to the particular circumstances of the case, "the method and rate of depreciation used by the three civilian contract flying schools was based upon the useful economic life of the equipment in the business." The flight-training schools did not, however, take into account the salvage value of the moveable equipment in determining depreciation. The District Court held, with respect to the question of useful life, that, in circumstances where it can reasonably be ascertained that equipment will no longer be useful to the business at a certain time, the proper method is to depreciate the property to the date of such occurrence; and that taxpayers, in depreciating the equipment over the period of its estimated useful economic

life in the business, used a reasonable method under the circumstances.[19] The court then went on and held that the taxpayers erred in not including a salvage value of 10% of original cost in the depreciation computation, since the equipment, at the end of its period of usefulness to taxpayers, had considerable resale value "in the open market" which could have reasonably been estimated at the end of each of the four taxable years in question.[20] Since salvage value is merely the estimated amount which will be realizable upon the sale or other disposition of an asset when it is no longer useful in the taxpayer's business and is retired from service by the taxpayer, it follows that cases dealing with the question of the amount of salvage value to be taken into consideration in computing depreciation often indirectly deal with the question of the useful life of the asset in the business. The salvage value cases will be discussed in detail in Point II.

In its opinion, the Tax Court cited the case of *McWilliams* v. *Commissioner*, 15 B. T. A. 329, 344-345, a case dealing with the depreciation of auto-

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[19] The District Court cited the cases of *U. S. Cartridge Co.* v. *United States*, 284 U. S. 511; *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, and *Gambrinus Brewing Co.* v. *Anderson*, 282 U. S. 638. These cases deal with the obsolescence factor of the depreciation deduction, a factor which is also of major importance in the depreciation of taxpayer's automobiles.

[20] The taxpayers have appealed to the United States Court of Appeals for the Sixth Circuit only on the salvage value issue. The Commissioner did not appeal.

mobiles over their useful life in a taxpayer's business. The taxpayer attempts (Br. 42-43) to distinguish the case by limiting it to its particular facts. We, of course, recognize that a reasonable allowance for depreciation depends upon the peculiar facts of each case. *Pittsburgh Hotels, Co.* v. *Commissioner*, 43 F. 2d 345, 347 (C. A. 3d); *Washburn Wire Co.* v. *Commissioner*, 67 F. 2d 658, 660 (C. A. 1st); *Geuder, Paeschke & Frey Co.* v. *Commissioner*, 41 F. 2d 308, 310 (C. A. 7th). However, the case does show that, in the particular facts of a case, depreciation of an asset over its useful economic life in a business results in a reasonable depreciation allowance.[21] In the case of the depreciation of buildings, the courts have often noted that the useful economic life of a building in a business may be much shorter than the building's physical life; and, in such case, depreciation is computed over the building's economic life to the taxpayer. *Adda, Inc.* v. *Commissioner*, 9 T. C. 199, 209-210, affirmed on another issue, 171 F. 2d 367 (C. A. 2d); *First National Bank In Mobile* v. *Commissioner*, 30 B. T. A. 632; *Kent* v. *Commissioner*, decided December 31, 1953 (1954 P-H T. C. Memorandum Decisions, par. 54,011).

Taxpayer cites (Br. 17-24) a number of cases where apparently an asset was depreciated by a taxpayer on the basis of its physical life as distinguished

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[21] As to the depreciation of the sawmill in *McWilliams* v. *Commissioner, supra,* the case simply indicates that the evidence in the particular case warranted computing depreciation of the mill on the basis of its physical life instead of its life in the taxpayer's business.

from its useful life in the taxpayer's business.[22] The Commissioner recognizes that such a method of depreciation is often warranted if it does not produce an unreasonable depreciation allowance. Since each of the cases turns on its own particular facts, they do not establish a binding precedent for this case. In many of the cases, the facts are only briefly stated and the issue is summarily dealt with as one of fact. For example, in the cases of *Sanford Cotton Mills* v. *Commissioner*, 14 B. T. A. 1210; *Markle Brown Co.* v. *Commissioner*, 3 B. T. A. 1084; *Kurtz* v. *Commissioner*, 8 B. T. A. 679; and *General Securities Co.* v. *Commissioner*, decided March 9, 1942 (1942 P-H T. C. Memorandum Decisions, par. 42,219), the usual company car or truck situation was involved. The opinions indicate that physical wear and tear was the primary factor in the depreciation of the cars or trucks, and depreciation based on the physical life of the asset was found not to be unreasonable. On the other hand, in this case, the taxpayer's cars (particularly the short-term rental cars) are used in such a way that obsolescence is the principal factor involved and, as indicated, depreciation of the asset on a basis of a four-year physical life creates an unreasonable depreciation allowance in this particular case. Tax-

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[22] Most of the cases are Board of Tax Appeals or Tax Court opinions. Taxpayer cited many of the cases in his brief in the Tax Court. The Tax Court, which certainly is familiar with the holdings in its own opinions, apparently did not consider the opinions controlling on the issues presented by this case. We submit that an examination of the cases shows that they are not controlling here.

payer's reliance on the case of *Philber Equipment Corp.*, v. *Commissioner*, 237 F. 2d 129 (C. A. 3d), and the Commissioner's brief filed therein, is also misplaced. An examination of the opinion in that case shows that there was a single issue before the court relating to capital gain on the sale of motor vehicles at the end of the period of various leases. The issue of depreciation, or useful life and salvage value for purposes of depreciation, was not presented or passed upon. The language which taxpayer quotes from the opinion and brief (Br. 23) involves a discussion of a different legal issue and throws no light on the meaning of the term "useful life" for depreciation purposes. Likewise, the case of *Pilot Freight Carriers, Inc.* v. *Commissioner*, decided August 27, 1956 (1956 P-H T. C. Memorandum Decisions, par. 56, 195), does not set forth a legal principle controlling in the present case. In that case, the issue was factual, *i.e.*, the useful life of certain motor freight transportation equipment. There was no question of salvage value before the court. The taxpayer contended that its equipment was disposed of after it had passed the age of economic usefulness. The Commissioner had determined a longer useful life than that used by the taxpayer. The Tax Court found the useful lives to be slightly more than contended for by the taxpayer.

The case of *Massey Motors, Inc.* v. *United States*, 156 F. Supp. 516 (S. D. Fla.), presents a factual situation somewhat analogous to this case. The court's opinion on the depreciation issue, however, is in con-

flict with *Goldberg* v. *Commissioner*, 239 F. 2d 316 (C. A. 5th). The Commissioner considers that on the depreciation issue the District Court's opinion in *Massey* is erroneous, and an appeal is being taken on that issue to the United States Court of Appeals for the Fifth Circuit. The case of *Estate of Whitaker* v. *Commissioner*, 27 T. C. 399, 405-406, deals with a question of accelerated depreciation. Because of a leg injury, the useful life of a certain race horse, *i.e.*, its useful life to taxpayer as a race horse, was shortened. The horse's useful life to the taxpayer was not shortened because of wear and tear, but rather because of a non-recurring accidental injury. For this reason, accelerated depreciation was denied. It should also be noted that in the depreciation computation the taxpayer correctly took into consideration the $1,000 for which he sold the horse. The $1,000 clearly was not the scrap or junk value of the horse. The case clearly supports the Tax Court's opinion in this case.

3. *The Tax Court correctly rejected opinion evidence regarding the law applicable to this case.*

Finally, the taxpayer relies (Br. 25-26) on the testimony of two certified public accountants who testified as to their personal opinions on the law applicable to this case (R. 84, 89). We submit that the Tax Court was not bound by the personal opinions of taxpayer's accountants, and was clearly correct in rejecting their interpretation of the law of this case.[23]

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[23] The Commissioner objected to the opinion testimony of Mr. Paul Johnson, the first of taxpayer's "experts" to testify. (R. 86.) The court permitted the evidence to go into the

The District Court in *Koelling* v. *United States* (Neb.), decided February 14, 1957 (1957 P-H, par. 72,529), in dealing with similar expert testimony on depreciation by an Internal Revenue Agent, lawyers, and an accountant, correctly states:

> The fact that in the general area comprising the residence and operating location of a taxpayer a custom has grown up among taxpayers of computing income in a particular manner is neither controlling nor instructive in support of the taxpayer's observance of that custom in the preparation of his return. What matters is whether the method he employs is correct. Testimony of the sort tendered might easily have materiality if the issue were the good faith of the taxpayer in his following of the method. But that is not the present question, which is rather the validity on its own account of the method itself. The court is, accordingly, uninfluenced in its ruling by paragraphs numbered 29 and 30 of the stipulation, or either of them.

Contrary to taxpayer's assertion (Br. 26), the knowledge of taxpayer's experts regarding the Treas-

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record but stated that "I know it is not controlling. I am not going to let it control me". (R. 86.) It is well established that expert opinion testimony on domestic law, as distinguished from expert testimony on foreign law, is excludable under the so-called opinion rule. See Wigmore, Evidence (3d ed.), Section 1952. It is the function of the judge (or the jury as instructed by the judge) to determine the law applicable to the case. Wigmore states (Section 1954) that even in giving opinion testimony on trade usage "the witness should state the tenor of the usage or practice, omitting any reference to the legal effect."

ury Regulations and Bulletin "F" was shown to be somewhat limited. On cross-examination (R. 91), Mr. Raymond Hoffman confessed that he had no exact recollection as to whether the expression "useful life in the taxpayer's business" was used in the Treasury Regulations or Bulletin "F". As already pointed out, the expression "useful life of the property in the business" was expressly used in the Treasury Regulations from 1918 to 1942, is used in Bulletin "F", and the concept is presently spelled out in detail in the Treasury Regulations for the 1954 Code.

C. ***In the light of taxpayer's established business experience and practice, the Tax Court was clearly correct in holding that taxpayer must take into consideration in his depreciation computation the resale value of his automobiles which he recovers at the termination of their useful life in his business.***

It is basic that, in the computation of the annual allowance for depreciation, the cost of the property should first be reduced by the estimated salvage value thereof before applying the appropriate rate of depreciation. *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, 655; *United States* v. *Ludey*, 274 U. S. 295, 300-301; *Goldberg* v. *Commissioner*, 239 F. 2d 316, 319 (C.A. 5th); *Cohn* v. *United States* (W. D. Tenn.), decided February 25, 1957 (1957 P-H, par. 72,573), on appeal, C. A. 6th; *Humphrey* v. *Commissioner*, decided January 18, 1946 (1946 P-H T. C. Memorandum Decisions, par. 46,004), affirmed without discussion on this point, 162 F. 2d 853 (C. A. 5th), certiorari denied, 332 U. S. 817; *W. H. Norris*

Lumber Co. v. *Commissioner*, decided October 12, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,204); *Davidson* v. *Commissioner*, decided September 24, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,317); *Bolta Co.* v. *Commissioner*, decided November 28, 1945 (1945 P-H T. C. Memorandum Decisions, par. 45,360, modified, par. 45,372); Treasury Regulations 111, Section 29.23 (l)-1.

The reason that salvage value must be taken into account in computing the annual depreciation allowance is clear. As pointed out, depreciation for tax purposes is the method whereby the part of the cost of an asset used up or lost annually in producing gross income is charged against the yearly period the asset is used to produce the income so as to arrive at net income subject to tax. To correctly estimate the amounts to be periodically charged to expense as depreciation, it is necessary, as the Regulations, courts, and accounting authorities recognize, to make allowance for the amount for which the asset may ultimately be sold when it has completed its usefulness to the business, *i.e.*, its "salvage value." It is the cost of the asset, less this salvage value, which is then amortized over the years that the asset is used. Salvage value is thus merely the estimated amount which will be realizable upon the sale or other disposition of the asset when it is no longer useful in the taxpayer's business and is to be retired from service by the taxpayer. *Burnet* v. *Niagara Brewing Co.*, *supra*, p. 655; *Goldberg* v. *Commissioner*, *supra*, p. 319.

It is apparent, contrary to taxpayer's assertions (Br. 28-30), that "salvage value" is not necessarily limited to "scrap" or "junk value." "Salvage value," may, as in this case, represent a high percentage of the asset's original cost. If it is estimated that the asset will be used by the taxpayer to the end of its intrinsic useful life, or if it is a specialized type of asset which is not readily salable, its "salvage value" might be no more than a "scrap value." See *Whitham* v. *Commissioner*, decided March 16, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,075); *Brown* v. *Commissioner*, 27 T. C. 27, 31, 36; Finney and Miller, Principles of Accounting, Intermediate (4th ed.), p. 442. On the other hand, if the asset will be disposed of long before its physical life has expired, probably will be in salable condition, and will be readily marketable, the salvage value may represent a large proportion of the original cost of the asset.[24]

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[24] In this connection, Bulletin "F" provides (p. 7):

> Salvage value is the amount realizable from the sale or other disposition of items recovered when property has become no longer useful in the taxpayer's business and is demolished, dismantled, or retired from service. When reduced by the cost of demolishing, dismantling, and removal, it is referred to as net salvage. In principle, the estimated net salvage should serve to reduce depreciation, either through a reduction in the basis on which depreciation is computed or a reduction in the rate. In either instance the amount of net salvage should actually, or in effect, be a credit to the depreciation reserve. Where the basis or rate for depreciation is not reduced for estimated salvage, all net receipts from salvage should be considered income.

See also *Cohn* v. *United States, supra*; *Davidson* v. *Commissioner, supra*; *Terminal Realty Corp.* v. *Commissioner,*

See Treasury Regulations on Depreciation (1954 Code), Section 1.167(a)-1(c) (Appendix B, *infra*). The Supreme Court, in *Burnet* v. *Niagara Brewing Co.*, *supra*, p. 655, has stated that:

> In determining the proper deduction for obsolescence there is to be taken into consideration the amount probably recoverable, at the end of its service, by putting the property to another use or by selling it as scrap or otherwise. There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolesence.

In the case of *Goldberg* v. *Commissioner*, *supra*, the depreciation of motor vehicles and coin-operated equipment was involved. The Tax Court held that at the end of a three-year depreciation period, there was a salvage value of ten percent of the cost of the assets. In affirming, the Court of Appeals for the Fifth Circuit noted that (p. 319) "It was apparent that the equipment had a value in excess of what it would bring as scrap or junk. The Tax Court so found, and

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32 B.T.A. 623, 629; *Humphrey* v. *Commissioner*, *supra*. Thus, in either case (*i.e.*, whether by subtraction of the estimated salvage value from the cost of the asset to obtain the amount to be amortized annually, or by a reduction in the rate or percentage of depreciation to be applied to the cost of the asset), the effect is to reduce the annual amount of allowable depreciation, thereby adjusting depreciation to its true picture, since the true cost of the asset to the business is the cost less the amount ultimately to be received upon the disposal of the asset.

found the percentage of the salvage value." Likewise, in the case of *Cohen* v. *United States*, *supra*, the District Court held that the substantial resale value of certain aviation equipment had to be included in the taxpayers' depreciation computation as salvage value.

In two other cases, the Tax Court has required taxpayers to include as salvage value in the depreciation computation the substantial resale value of motor vehicles which it was estimated would be reasonably recovered upon the disposal of the car or truck when it was no longer useful in the business. In *W. H. Norris Lumber Co.* v. *Commissioner*, *supra*, the taxpayer depreciated its automotive equipment over a period of four years and included no salvage value. The Tax Court upheld the Commissioner's determination that in each of the taxable years it was apparent to the taxpayer that the automotive equipment would have a substantial resale value. In that case, the salvage value was estimated to be twenty percent of cost. In *Davidson* v. *Commissioner*, *supra*, a salvage value in the amount of twenty percent was also required for certain cars and trucks used in a construction business. The court found that, ordinarily, some of the taxpayer's construction equipment could only be disposed of as junk and that it could not, on the facts of the case, be reasonably estimated what the salvage value, if any, would be. However, the court found that, in view of the amounts being consistently recovered, it was apparent to the taxpayers that "its automobiles and trucks would have substantial salvage values at the end of the period over which the partnership was depreciating them." Under the cir-

cumstances of the case, a salvage value of twenty percent of cost was held to be conservative.

Another Tax Court case, *Bolta* v. *Commissioner*, *supra*, involved the depreciation of plastic injection machines which were used to make combs. After several years' use, a machine was no longer useful in the taxpayer's business for making combs, but was good for making other plastic articles which the taxpayer did not manufacture. Thus, the taxpayer used a machine for five years and then sold it, recovering a substantial portion of its cost. The taxpayer included no salvage value in the depreciation of the machines. The Tax Court, however, found that in this case, where the resale value could be reasonably estimated, a salvage value of twenty-five percent of original cost was required.

In arguing (Br. 28-30) that for purposes of depreciation the term "salvage value" can mean only "junk or scrap value," the taxpayer relies on the case of *Koelling* v. *United States* (Neb.), decided February 14, 1957 (1957 P-H, par. 72,529). His reliance is misplaced. An examination of the opinion shows that the principles which it enunciates clearly support the Tax Court's opinion here. In *Koelling*, the District Court stated that the basis for depreciation of a breeding herd of cattle was its cost less salvage value, rather than cost alone. The court considered unreasonable the deduction of the entire cost of the cattle through annual depreciation over the breeding life in the herd, since the court held that at the end of the useful breeding period the cattle still had a "substantial salvage value," either in the open

livestock market or, in many instances, by way of resale to other breeders. This substantial sale value, the court found, was susceptible "to intelligent and practical computation."

D. *The evidence in the record fully supports the Tax Court's findings of fact and opinion.*

Applying the foregoing principles to the facts of this case, it is clear that during the taxable years involved the taxpayer should have depreciated his short-term rental and extended-term lease cars over a useful life of respectively fifteen months and three years. It is also clear, on the facts of this case, that the reasonably estimable salvage value was that found by the Tax Court. We submit that there is substantial evidence in the record to support the findings of the Tax Court and, certainly, the findings cannot be said to be clearly erroneous.

The Supreme Court has stated that "It is well understood that exhaustion, wear, tear or obsolescence cannot be accurately measured as it progresses and undoubtedly it was for that reason that the statute authorized 'reasonable' allowances * * * in order equably to spread that element of operating expenses through the years." *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638, 645. Therefore, all that is required is "A reasonable approximation of the amount that fairly may be included in the accounts of any year * * *." *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, 655. See also *Koelling* v. *United States* (Neb.) decided February 14, 1957 (1957 P-H, par. 72,529); *Cohn* v. *United States* (W.D. Tenn.), de-

cided February 25, 1957 (1957 P-H, par. 72,573), on appeal, C.A. 6th; *Terminal Realty Corp.* v. *Commissioner*, 32 B. T. A. 623, 629; *Davidson* v. *Commissioner*, decided September 24, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,317); *Bolta Co.* v. *Commissioner*, decided November 28, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,360, modified, par. 45,372).

We fully recognize the fact that useful life for depreciation purposes is an estimate. Nor do we dispute the proposition that salvage value is an estimated figure which must be determined initially at the date of acquisition of the property, when the amount of allowable depreciation is first established. We do contend, however, that Section 23(l) requires a reasonable approximation of depreciation on the basis of the actual experience and practices of the business involved. We also dispute any contention that, once estimates of useful life and salvage value have been initially made, the parties are precluded from thereafter adjusting the estimate where it is obviously in error.[25] As noted, the reasonableness of any claim for depreciation is determined upon the conditions known to exist at the end of the period for which the return is made and, when it is obvious that a fact involving useful life or salvage value is in error, the deduction is to be corrected in that year and in any subsequent year. *Washburn Wire Co.* v. *Commissioner*, 67 F. 2d 658 (C. A. 1st); *Commissioner* v. *Mutual Fertilizer Co.*, 159 F. 2d 470 (C. A.

[25] See Rev. Rul. 90, 1953-1 Cum. Bull. 43; Rev. Rul. 91, 1953-1 Cum. Bull. 44.

5th); *Leonard Refineries, Inc.* v. *Commissioner*, 11 T. C. 1000, 1006-1007; *Weir Long Leaf Lumber Co.* v. *Commissioner*, 9 T. C. 990, 998, reversed on other grounds, 173 F. 2d 549 (C. A. 5th); Treasury Regulations 111, Section 29.23(l)-5.

Contrary to taxpayer's assertions (Br. 26, 42), the evidence clearly shows that well prior to the taxable years 1950 and 1951 taxpayer had reason to know that he was not going to be using his cars for anywhere near their full physical life, which he alleges to be four years. Likewise, it is clear that taxpayer reasonably knew, well prior to the years 1950 and 1951, that he would recover a substantial portion of the cost of the cars when he sold them. Certainly, his computation of a zero salvage value was clearly erroneous and demanded adjustment. The taxpayer has testified (R. 79-81) and the Tax Court has found (R. 28, 31) that, at least since 1949, the customers of U-Drive demanded "automobiles that were currently in style." Time was more important than mileage in taxpayer's business (R. 81), since many of taxpayer's cars were used in the tourist business and were sold off at the end of the tourist season, i.e., Labor Day (R. 27-28, 46). Taxpayer himself testified that during the years in question he was holding the extended-term lease cars between eighteen to thirty-six months and the short-term rental cars between fourteen to sixteen months. (R. 45, 54, 63-64, 79-81.) An examination of the schedules attached to taxpayer's returns for the years 1947 to 1951 (See Exs. 5, 11, A, B and C) shows that, except during World War II and immediately thereafter, taxpayer

was using the cars for a short period of time, and that during the taxable years in question he could have reasonably estimated the length of time he would use the cars in the two types of rentals.[26]

Likewise, the record clearly shows that when taxpayer acquired the automobiles he could have made a reasonably close estimate of the resale value of the cars, particularly the 60 to 70 per cent which he held on an average of fifteen months. The taxpayer has testified (R. 46-49), and the Tax Court has found (R. 28), that taxpayer had an established market with used car dealers, jobbers, or brokers for the sale of his cars. As Mr. Verhey, a used-car dealer, has testified (R. 57-62), the used car market is a highly organized and well-informed market. Every thirty days the National Automobile Dealers Association book was, and is, issued showing the prices being paid wholesale and retail for used cars of different ages, makes, and models. (R. 60). Taxpayer has been a proprietor in the rental-car business since 1936, and had worked for others in that business since 1924. (R. 26, 42.) It is obvious from his long experience in buying, renting and then selling cars that taxpayer was well aware of the methods employed in the used car market and the information available therein. With his years of experience and the market information available to him, it is inconceivable that taxpayer, having a good idea of how long he would use his cars and who would probably

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[26] The capital gains schedules attached to taxpayer's returns for the years 1952 through 1954 (Exs. D, E, and F) indicate that taxpayer's established business practice of only holding cars for a short time is fixed and continuing.

buy them, could not have made a reasonable estimate when he bought a car of the resale value that would be recovered when he sold it.

Taxpayer has testified that he could not estimate how long he would hold a car or what its sales price would be when he sold it because of the possibility of strikes, technical advances in building automobiles, and war. (R. 66-67, 69, 70-71.) The short answer is that all taxpayer is required to do is make a "reasonable" estimate. The rates and estimates involved in a depreciation computation are subject to adjustment if some unforeseen development would make them unreasonable for the taxpayer's business, particularly in the case of war. Taxpayer's excuses are especially unconvincing in the light of the fact that he has completely ignored the realities of his business, and the Tax Court was clearly correct in rejecting his testimony. Strikes in the auto industry might, of course, delay delivery of new cars for a month or so and drive up temporarily the value of used cars. Such contingencies, however, are fairly minor over a fifteen-month or a three-year period, and are subject to reasonable estimation and adjustment. It is also common knowledge that there was and is considerable advance notice about technological developments in automobiles. Important mechanical developments are introduced over a period of several years. Clearly, in this case obsolescence due to mechanical developments did not present an insurmountable barrier to a reasonable estimation of the useful life and salvage value of taxpayer's automobiles. In respect to estimating salvage value, the instant case is similar to

Koelling v. *United States*, *supra*, where the District Court noted that in intelligently estimating salvage value the cattle breeder had the benefit of the sales price information provided by the Omaha livestock market. Indeed, as the Tax Court expressly noted (R. 31), the findings here are based upon the conditions known to exist at the end of the two years for which the returns were made, and not upon conditions which developed years later. Treasury Regulations 111, Section 29.23(l)-5. (R. 28-30; Exs. B and C.)

The taxpayer also argues (Br. 29-30, 43-44) that the Tax Court's findings regarding salvage value are based upon a so-called invalid "sales proceeds theory." It is true that the Regulations state that salvage value may not be changed merely because of a change in price levels. Thus, minor fluctuations in market value, which affect the estimated salvage value used in computing depreciation, will not be used to adjust the allowable depreciation for a particular year. However, where market value fluctuates a great deal so that the depreciation allowance is obviously distorted, the Commissioner has sought the adjustment thereof, and the courts have held that, in such circumstances, the salvage value should be adjusted. See *Horace Williams Co.* v. *Lambert* (E.D. La.), decided July 10, 1956 (1956 P-H, par. 72,920), affirmed without discussion of this point, 245 F. 2d 559 (C.A. 5th).[27]

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[27] In that case the salvage value of a particular asset, in 1948 and 1949, was $50,000. In 1950, the tax year in question, the salvage value fluctuated from zero to $30,000. The

Indeed, it is clear that the Commissioner did not base his determination nor did the Tax Court base its decision in this case solely on the sales prices of the cars. Other circumstances such as the short period that taxpayer was holding the cars clearly indicated that a reasonably estimable salvage value existed far in excess of the zero value which taxpayer claimed. It should also be noted that the Tax Court's findings in regard to salvage value are not limited to the results in a few sales but are based on almost three hundred sales in an open market over the two taxable years. (R. 28-30.) The amount ultimately received on sales, when known, is certainly of assistance to the court in determining what a reasonable estimate would have been. Actual experience can be used to justify an estimate of salvage value. *Bolta Co.* v. *Commissioner*, *supra.*; *Davidson* v. *Commissioner*, *supra.* Indeed, the actual sales price has been held to be the best indication of the estimated salvage value. See *Caruso* v. *Commissioner*, 23 T. C. 836, where the actual sales price was used to adjust salvage value (and allowable depreciation) adversely to the Commissioner. The realities and economics of the situation control the determination of the proper estimate of salvage value (*Koelling* v. *United States*, *supra*), and the court is concerned with adjusting depreciation to its "true picture" (*Humphrey* v. *Commissioner*, *supra*). Certainly, the court is not expected to close its eyes to what actually

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court found that an estimated value of $30,000 was fair and reasonable and the depreciation allowance for 1950 was adjusted accordingly.

occurred in marshalling the facts relevant to making its finding of what was a reasonably estimable salvage value.[28] We submit that the Tax Court's find-

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[28] We believe that taxpayer's reliance (Br. 30, 44) on *Denny* v. *Commissioner,* 33 B. T. A. 738, is misplaced. As already indicated, the Tax Court's findings regarding depreciation are not based solely on "shrinkage of market value." The findings are based on the depreciation in the value of the cars due to obsolescence in taxpayer's business, and wear and tear.

Similar cases such as *Thos. Goggan & Bro.* v. *Commissioner,* 45 B. T. A. 218; *Weir Long Leaf Lumber Co.* v. *Commissioner, supra*; and *Transoceanic Terminal Corp.* v. *Commissioner,* decided March 18, 1954 (1954 P-H. T. C. Memorandum Decisions, par. 54,080), are also distinguishable. Each case turns on its own facts. Thus, in *Thos. Goggan & Bro.,* the Board merely held (pp. 224-225) that the difference in the trade-in value of an automobile (which was $206.89 less than the depreciated, or book, value thereof) would not, *by itself* and without evidence of actual usage, be sufficient evidence to support the contention that the actual depreciation was in excess of that already claimed. In *Weir Long Leaf Lumber Co.,* the court's holding with respect to the mill property (9 T. C., pp. 998-999) fully supports the Tax Court in this case (*i.e.,* that estimated salvage value, as well as estimated useful life, is to be determined upon conditions known to exist at the end of the tax year and, when it is apparent that the factor of salvage value is erroneous, an adjustment of the error should be made.) In regard to the automobiles involved, the court expressly noted (9 T. C., p. 999) that the issue was narrowed, by stipulation, to whether the price received upon the sale of the asset, by itself, precluded any depreciation allowance for the year in question. The court, citing *Goggan,* held that it did not. *Transoceanic Terminal Corp.* merely held that, on the facts of that case, the average trade-in value of an asset, by itself, was not sufficiently accurate evidence of the reasonably estimable salvage value, because unusually high allowances were granted to induce the taxpayer to purchase new equipment. The distinction between

ings and opinion are fully supported by the facts and the law.

E. *The opinion of the Tax Court is in full accord with the purpose of Section 117(j) of the Code.*

Finally, taxpayer argues (Br. 31-36) that the Commissioner, and apparently the Tax Court, are trying to obviate Section 117(j) of the 1939 Code (26 U. S. C. 1952 ed., Sec. 117(j)). That section permits capital gain upon the sale or exchange of certain property used in trade or business. What taxpayer overlooks is the fact that Section 117(j) must be interpreted and applied in conjunction with Section 23(l)'s direction that only a "reasonable allowance" for depreciation be deducted. This is true due to the fact that the basis which is used to determine capital gain under Section 117(j) is the original cost of the asset less the depreciation deducted therefrom, *i.e.*, depreciated cost basis. (See Exs. B and C.) In recently dealing with the purpose of Section 117, the Supreme Court stated in *Commissioner* v. *Lake*, 356 U. S. 260, 265, that:

> The purpose of § 117 was "to relieve the taxpayer from * * * excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of

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the former cases and this case are clear. In this case, there are factors in addition to the actual sales price of the assets upon which the reasonableness of the estimates are based. Here, the evidence showed substantial discrepancies between estimated and actual useful life and estimated and actual salvage value. The actual salvage value of the cars was simply another factor considered in determining a reasonable depreciation allowance.

those burdens on such conversions." See *Burnet* v. *Hormel*, 287 U. S. 103, 106. And this exception has always been narrowly construed so as to protect the revenue against artful devices. See *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 52.

The effect which the Tax Court's opinion has upon taxpayer's capital gain income stems solely from the fact that the court has followed Congress' direction to permit annually, as an expense of a business, the deduction of only a reasonable depreciation allowance. Furthermore, contrary to taxpayer's claim (Br. 31, 35), the decision of the Tax Court does not deny him capital gain upon the sale of his cars. For example, taking the average cost and sales price for 1950 and 1951, as found by the Tax Court (R. 28-29), and the holding of the court regarding the depreciation computation for short-term rental cars for the years 1950 and 1951 after fifteen months' use of a car (*i.e.*, the useful life of a short-term rental car in taxpayer's business), the taxpayer would average approximately $5 capital gain per car in 1950 and approximately $20 capital gain per car in 1951. This, of course, is considerably less than taxpayer claimed during those years after taking an excessive depreciation allowance. There is nothing in Section 117(j), however, which guarantees capital gain to a taxpayer. The Tax Court's opinion merely results in the capital gain being predicated upon a reasonably depreciated cost basis. This is clearly in accord with the Congressional purpose.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JULY 1958.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

* * * *

(l) [as amended by Sec. 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(l)-1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not neces-

sarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113. Due regard must also be given to expenditures for current upkeep. * * *

SEC. 29.23(l)-2. *Depreciable Property.*—The necessity for a depreciation allowance arises from the fact that certain property used in the business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, or to land apart from the improvements or physical development added to it. It does not apply to bodies or minerals which through the process of removal suffer depletion, other provisions for this being made in the Internal Revenue Code. (See sections 23(m) and 114.) Property kept in repair may, nevertheless, be the subject of a depreciation allowance. (See section 29.23(a)-4.) The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income. No such

allowance may be made in respect of automobiles or other vehicles used solely for pleasure, a building used by the taxpayer solely as his residence, or in respect of furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be the subject of a depreciation allowance.

SEC. 29.23(l)-4. *Capital Sum Recoverable Through Depreciation Allowances.*—The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. (See sections 113(a) and 114.) To this amount should be added from time to time the cost of improvements, additions, and betterments, and from it should be deducted from time to time the amount of any definite loss or damage sustained by the property through casualty, as distinguished from the gradual exhaustion of its utility which is the basis of the depreciation allowance. (See section 113(b).) * * *

SEC. 29.23(l)-5). *Method of Computing Depreciation Allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period

for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition, and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation allowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed.

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. * * *

APPENDIX B

Treasury Regulations on Depreciation (1954 Code):
Sec. 1.167(a)-1. Depreciation in general—

(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(f) and § 1.167(f)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. See paragraph (c) below for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value.

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probably future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from

natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and Section 1.167(d)-1.

(c) *Salvage.* Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels. However, if there is a redetermination of useful life under the rules of paragraph (b), salvage value may

be redetermined based upon facts known at the time of such redetermination of useful life. Salvage, when reduced by the cost of removal, is referred to as net salvage. The time at which an asset is retired from service may vary according to the policy of the taxpayer. If the taxpayer's policy is to dispose of assets which are still in good operating condition, the salvage value may represent a relatively large proportion of the original basis of the asset. However, if the taxpayer customarily uses an asset until its inherent useful life has been substantially exhausted, salvage value may represent no more than junk value. Salvage value must be taken into account in determining the depreciation deduction either by a reduction of the amount subject to depreciation, or by a reduction in the rate of depreciation, but in no event shall an asset (or an account) be depreciated below a reasonable salvage value. See, however, Section 1.167 (b)-2(a) for the treatment of salvage under the declining balance method. The taxpayer may use either salvage or net salvage in determining depreciation allowances but such practice must be consistently followed and the treatment of the costs of removal must be consistent with the practice adopted. For specific treatment of salvage value see Sections 1.167(b)-1, 2, and 3. When an asset is retired or disposed of, appropriate adjustments shall be made in the asset and depreciation reserve accounts. For example, the amount of the salvage adjusted for the costs of removal may be credited to the depreciation reserve.

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FOR THE NINTH CIRCUIT

No. 15985

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husband and wife,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Reply Brief for Petitioners

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In an attempt to justify and support the Tax Court's opinion below, the Commissioner (1) introduces references to the doctrine of obsolescence, although no property involved in this case is obsolete; (2) seeks to apply to 1950-1951, the years in issue, definitions of the terms "useful life" and "salvage value" which appeared for the first time in the Regulations promulgated in 1956 under the Internal Revenue Code of 1954; and (3) conversely, stresses and strains the meaning of the term "in the business" found in the Regulations and in some cases prior to 1942.

The Commissioner advances the first two theories mentioned above merely to rationalize his position, based upon his application of the third.

Prior to the promulgation in June, 1956, of Regulations under Section 167 of the 1954 Code (wherein the definitions of "useful life" and "salvage value" are designed to limit the application of the new alternative methods of computing depreciation), the terms "useful life" and "salvage value" were consistently interpreted by the courts, the Commissioner and taxpayers to mean the physical life of the asset and junk or scrap value at the end of such life, respectively. Indeed, up to that time, disputes between the Commissioner and taxpayers invariably arose because the Commissioner was attempting to impose a longer period of useful life (one measured by the physical life of the assets), than the taxpayer was willing to use.

It is significant that the Commissioner has not cited a single case or ruling under the 1939 Code or prior Revenue Acts in which he contended for (much less established) the position which he now takes both in this case and in the Regulations under the 1954 Code, that useful life means the period an asset is used by a taxpayer in his business. The explanation for this lack of citation is obvious—there is none. Heretofore, the Commissioner maintained that useful life meant the physical or inherent functional life of the property. The petitioner herein adopted what was then the Commissioner's position when he prepared his returns for 1950 and 1951.

(1) The Tax Court's definitions of useful life and salvage value are conclusions of law which are fully reviewable by this Court.

The Commissioner's brief states (page 3) that the findings of the Tax Court must be accepted as the facts of the case unless shown to be clearly erroneous, and then proceeds to enumerate these findings. The last two find-

ings enumerated (page 6) are those assigning specific figures for the useful lives and salvage values of petitioner's automobiles.

What meanings should be ascribed to the terms "useful life" and "salvage value" are clearly questions of law, whatever the facts may be as to the time the automobiles will last, or how much they will be worth as junk. We submit that there is no legal foundation for the Commissioner's contention that this Court cannot review the interpretation the Tax Court placed on these two terms.

On this question, the Supreme Court of the United States said, in *Helvering* v. *Tex-Penn Oil Co.,* 300 U.S. 481 (1937), at page 491:

> ". . . In addition to and presumably upon the basis of these findings, the board made its 'ultimate finding.' And upon that determination it ruled that the transaction was not within the non-recognition provisions of §202(b). The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board."

See also: *Bogardus* v. *Commissioner of Internal Revenue,* 302 U.S. 34, 39 (1937).

The Court of Appeals for the Third Circuit pointed out in *Philber Equipment Corporation* v. *Commissioner of Internal Revenue,* 237 F. 2d 129 (C.A. 3rd, 1956), with respect to the reviewability of the Tax Court's "ultimate finding of fact":

> ". . . since such finding is but a legal inference from other facts it is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court. . . ." (237 F. 2d, at 131).

See also: *Hypotheek Land Co.* v. *Commissioner of Internal Revenue,* 200 F. 2d 390 (C.A. 9th, 1952), at page 392; and *Casale* v. *Commissioner of Internal Revenue,* 247 F. 2d 440 (C.A. 2nd, 1957), at page 443.

There is no "clearly erroneous" rule with respect to questions of ultimate fact or matters involving conclusions of law. Upon such matters and questions a reviewing court may substitute its judgment for that of the Tax Court.

The Tax Court's unreasoned acceptance of new definitions of useful life and salvage value involves a decision concerning the correct definition of legal terms used in the governing tax regulations and is therefore fully reviewable by this Court.

(2) There is no obsolescence question in this case.

It is understandable that the Commissioner in his brief (see, particularly, page 13) treads lightly and inconclusively on an alleged obsolescence factor in this case. Regulations 111, governing the taxable years here in issue, provided in Sec. 29.23(1)-6, in part:

> "With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions *that will result in its being abandoned* at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost or other basis at the end of its economic term of usefulness, a reasonable deduction for obsolescence, *in addition to depreciation,* may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made." (Emphasis added.)

The allowance for obsolescence authorized by the statute has always been designed to give taxpayers an additional

deduction, over and above the normal depreciation. The Commissioner does not suggest the allowance of an additional deduction in connection with his claim (Brief, pages 11-12) that "Because of the nature of taxpayer's business, it is clear that obsolescence, rather than physical exhaustion, was the principal factor in the depreciation of most of his automobiles." Indeed, the Commissioner's suggested application of the obsolescence doctrine in this case concludes with the anomalous result of petitioner's being allowed a deduction substantially less than the amount he would ordinarily be entitled to under a straight-line 25% depreciation rate.

The foundation for obsolescence, according to the Regulations, is the expected early "abandonment" of the property. The term "abandoned", as used in those regulations, has repeatedly been held not to include property which was to be sold at a time when it had substantial value and was to be used for other purposes, instead of being scrapped. In *The Olean Times-Herald Corporation,* 37 BTA 922 (1938), the Board of Tax Appeals denied the taxpayer an allowance for obsolescence of a printing plant and building which it no longer used, noting that the building could be put to other use (just as petitioner's cars could be put to other uses), and that in fact the building was not abandoned in 1933, but rather it was put up for sale in that year and sold in 1935.

Similarly, in *Southeastern Building Corporation,* 3 TC 381 (1944), aff'd 148 F. 2d 879 (C.C.A. 5th, 1945), cert. den. 326 U.S. 740, the Tax Court held that a deduction for obsolescence was not allowable for taxpayer's warehouse where "Though the special use [of the warehouse] will terminate at a certain date, *the property is neither to be scrapped nor abandoned, and will continue to have economic usefulness, though in a different use.*" (3 TC, at 388; emphasis added.)

In the case at bar, there was no abandonment. The assets undeniably continued to have economic usefulness.

Recently, the Court of Appeals for the Second Circuit affirmed the Tax Court's opinion in *Giles E. Bullock, et al.,* 26 TC 276 (1956), aff'd 58-1 USTC Para. 9418 (April 7, 1958), in which the Tax Court rejected taxpayer's contention that his depreciable equipment was obsolete. It was the Court's view that assets which are shown to have substantial economic and business value are not obsolete within the meaning of Section 23(l) of the 1939 Code, stating that there was no evidence in the record that the asset involved was "being affected by economic conditions that [would] result in its being abandoned at a future date prior to the end of its normal useful life." (26 TC, at 281.)

During the years in issue, the automobiles of petitioner herein were sold for substantial amounts. On the facts of this case, there is no issue of obsolescence, and the only question is the definition of the terms "useful life" and "salvage value" in the context of the applicable statutory words "exhaustion, wear and tear."

Indeed, it is on the basis of this fact of substantial value that the Commissioner has sought to divert the attention of this Court. After stating the proposition that the depreciation allowance must be reasonable, the Commissioner's brief states, at page 10, that "Taxpayer is not entitled to convert ordinary income into capital gain through the depreciation deduction"—the implication apparently being that the production of a capital gain after the taking of depreciation is unreasonable. This is then called a "device" (page 11) or a "scheme" (page 8).

The facts are that during the taxable years in question, 1950 and 1951, the price of used cars went up abnormally because of the Korean War and anticipated rationing (R.

71), causing an unusually small decline in the market value of the cars as compared with the depreciation taken on them. It can be seen that during such periods of rising used car prices it is inevitable that depreciation will exceed the shrinkage in market value. The necessary corollary of this unusual market condition is the realization of capital gains upon asset disposal. Conversely, when the used car market declines, the market value shrinkage may well exceed depreciation and losses will be produced. Whatever the proper interpretation of salvage value may be, it surely may not, we submit, be an inflated selling price imposed on a taxpayer by the Commissioner's hindsight adjustment.

(3) The Commissioner's historical survey of the phrase "in the business" as it appears in the regulations does not sustain his position.

Throughout his brief, the Commissioner seeks to attach a peculiar significance to the phrase "useful life of the property in the business." In addition to citing the depreciation regulations as they appeared from 1918 to 1942, the Commissioner cites such judicial decisions as *United States* v. *Ludey,* 274 U.S. 295 (1927), also cited by the Tax Court below. From his discussion accompanying these citations we understand the Commissioner to be saying that from 1918 to 1942, the regulations with respect to depreciation and the courts have defined the term "useful life" to be the period during which an asset is used by the taxpayer "in the business". On the basis of the Commissioner's own analysis of the reasons and need for changing the regulations in 1942 and the decisions of the courts during the period 1918-1942, discussed in petitioner's opening brief (pages 17 to 21), we submit that the Commissioner's position is untenable.

If the term "useful life of the property in the business" were intended to define the period of useful life for depreciation purposes, as now contended by the Commissioner, its deletion in 1942 would have been both unnecessary and inappropriate. As the Commissioner correctly points out at page 23 of his brief, the regulations were changed in order to "give the Regulations broader application, *i.e.*, to depreciation 'of property held for the production of income.'" In other words, the term "in the business" as it appeared in the court decisions and the regulations from 1918 to 1942, had the sole purpose of defining the nature or type of assets which could be depreciated by a taxpayer, that is, property "devoted to business" or, simply, "business property". It is clear that the term did not mean and never was intended to be a limitation on the period during which business assets could be depreciated.

(4) The Commissioner erroneously seeks to apply to this case his new definitions contained in the 1956 regulations issued under the 1954 Code.

It is apparent that the Commissioner's theory of this case is that it is governed by his new depreciation regulations—issued on June 11, 1956 under the 1954 Code enacted on August 16, 1954.

Not only does he quote them at length in Appendix B to his brief, but the following comparison shows that the Commissioner, in his brief, has liberally adopted language from the 1956 regulations which is nowhere to be found in the regulations applicable to this proceeding (Regulations 111) or in any of the other 85 authorities cited in his brief:

From Commissioner's brief herein	From the 1956 regulations (*not* applicable to the taxable years 1950 and 1951)	From the app cable regulatio —111
Page 7: " . . . [T]he Commissioner contends that, for the purpose of computing a reasonable depreciation allowance pursuant to Section 23(1), *the estimated useful life over which an asset is to be depreciated by a taxpayer is not necessarily the useful life inherent in the asset, and in the present case is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business.*" (Emphasis added.) [This language is repeated in substantially identical manner at page 18 of the Commissioner's brief.]	Reg. Sec. 1.167(a)-1(b) [in part]: "For the purpose of section 167 *the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income.*" (Emphasis added.)	[No definition useful life is gi en in the app cable regul tions.]
PP. 7-8: "Similarly, it is submitted that *salvage value,* as that term is used in the Treasury Regulations interpreting Section 23(1), *means the amount (determined at the time of acquisition) which it is reasonable to estimate will be realizable upon the sale or other disposal of the asset when it is no longer useful in a taxpayer's business and is retired from service.*" (Emphasis added.) [This language is repeated in substantially identical manner at pages 18-19 of the Commissioner's brief.]	Reg. Sec. 1.167(a)-1(c) [in part]: *"Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer."*	[No definition salvage value given in the a plicable regul tions.]

With nothing in the applicable regulations, rulings or decisions to sustain the Commissioner's present claims as to the meanings of useful life and salvage value, it is understandable that he would like this case to be decided on the basis of his newly evolved concepts in the 1956 regulations, which, of course, cannot control determination of the issues at bar.

(5) The authorities relied on by the Commissioner do not support his contentions herein.

The cases cited by the Commissioner at page 28 of his brief neither support his conclusions nor assist in the determination of the issues here involved.

Burlington Gazette Co. v. *Commissioner of Internal Revenue,* 75 F. 2d 577 (C.C.A. 8th, 1935), stands for the proposition that annual depreciation deductions may not aggregate more than the cost of the asset. We do not dispute this.

Cameron v. *Commissioner of Internal Revenue,* 56 F. 2d 1021 (C.C.A. 3rd, 1932), decided the status of a partnership in connection with allowance of a new rate for the depreciation of partnership assets, and also determined the value of depreciable property on March 1, 1913. Neither point is relevant here.

Becker v. *Anheuser-Busch, Inc.,* 120 F. 2d 403 (C.C.A. 8th, 1941), concerned a special argument on the alleged obsolescence of beverage bottles and cases incident to the onset of National Prohibition. These bottles and cases, held the court, would produce a loss for tax purposes only upon final disposition (120 F. 2d, at 418). We have no concern with National Prohibition or with bottles, obsolete or otherwise, herein.

With respect to *Cohn* v. *United States,* 57-1 USTC Para. 9457 (D.C.W.D. Tenn., 1957), (now on appeal to the Court of Appeals for the Sixth Circuit), it is a far cry from the specific target date of December 31, 1944 fixed by the Air Corps for the retirement of assets in that case to the numerous imponderables facing petitioner in this case and discussed in our opening brief at pages 4 and 26.

Throughout his brief the Commissioner repeatedly refers to the proposition that a reasonable allowance for depreciation depends upon the peculiar facts of each case, and cites the following cases as support for this proposition: *Pittsburgh Hotels Co.* v. *Commissioner of Internal Revenue,* 43 F. 2d 345 (C.C.A. 3rd, 1930); *Washburn Wire Co.* v. *Commissioner of Internal Revenue,* 67 F. 2d 658 (C.C.A. 1st, 1933); and *Geuder, Paeschke & Frey Co.* v. *Commissioner of Internal Revenue,* 41 F. 2d 308 (C.C.A. 7th, 1930). An examination of these cases discloses that they all involved *physical factors influencing the duration of the inherent economic usefulness* of the depreciable assets in question—not factors influencing the taxpayers' probable holding periods of the assets.

In the *Pittsburgh Hotels* case, these factors were the constant use of hotel property, out-dated construction and the extraordinarily dirty, corrosive air of Pittsburgh. In the *Geuder, Paeschke & Frey* case, an extraordinary repair and parts replacement policy prolonged the lives of the machines. In the *Washburn Wire* case, the court rejected the Commissioner's contention that the taxpayer's machines were not subject to depreciation after 1921 because the taxpayer (by taking 5% depreciation during 1912, 1913 and 1914 and 10% for the succeeding seven years) had impliedly given them a ten-year useful life and the ten years ended in 1921. The court allowed further depreciation because "The machinery was not worn out, nor

had full depreciation ever been taken on it." (67 F. 2d, at 661.)

On page 16 of the Commissioner's brief, he cites *Terminal Realty Corporation,* 32 BTA 623 (1935), with specific reference to page 629. We call the Court's attention to this statement by the Board of Tax Appeals on that page:

> "Deductions for depreciation are allowed for the purpose of restoring the cost of exhausting property over the period of its use from untaxed earnings derived from its use. The annual allowance is made pursuant to some plan for distributing the total cost of the plant over the period of its usefulness. *It is to be 'a reasonable allowance' with relation to the whole life period of the asset and need not be an exact measure of the actual wearing out of the property in the particular year. Under the 'straight line' method it may be assumed that depreciation proceeds at some average rate based upon an estimate of the number of years that the property will probably last."* (32 BTA, at 629; emphasis added.)

The Board's references to "the *whole life period of the asset,*" "the *actual wearing out* of the property" and "the number of years that the property will probably *last*" reveal depreciation as a process of physical exhaustion of the asset and useful life as the entire period of the asset's economic usefulness.

The Commissioner's treatment of two cases which we cited in our opening brief requires a few words.

With regard to the Commissioner's comment, at pages 32-33 of his brief, on *Massey Motors, Inc.* v. *United States,* 156 F. Supp. 516 (D.C.S.D. Fla., 1957), this Court will, of course, form its own conclusion as to whether the opinion on the depreciation issue in that case is erroneous. We fail to see, however, that the *Massey* case is in conflict

with *Goldberg* v. *Commissioner of Internal Revenue,* 239 F. 2d 316 (C.A. 5th, 1956), as contended at pages 32-33 of the Commissioner's brief. Not only are the facts in the *Goldberg* case far removed from those in the *Massey* case and in the instant appeal, but the only real depreciation point considered by the Tax Court or by the Court of Appeals had to do with salvage value. This was set up at an arbitrary figure, under the *Cohan* rule.

At page 32 of the Commissioner's brief, the Commissioner's representatives contend that *Pilot Freight Carriers, Inc.,* 15 TCM 1027 (1956) (discussed at pages 23-24 of our opening brief), is not relevant to the issues at bar. We submit that the Commissioner's attitude in this case is inconsistent with his claims in that one. There existed in the *Pilot Freight Carriers* case the very "pattern of use of property for a given period and resale at a substantial price at the end of that period" emphasized in the Commissioner's brief at page 15. Despite this, not only did the Commissioner fail to contend in *Pilot Freight Carriers* that the useful life was equal to the holding period, but he actually claimed that the useful life was considerably *in excess* of the holding period.

Burnet v. *Niagara Falls Brewing Co.,* 282 U.S. 648 (1931), and *Gambrinus Brewery Co.* v. *Anderson,* 282 U.S. 638 (1931), cited at various places in the Commissioner's brief, concerned computation of a deduction for obsolescence—a factor which, as we have shown, is not involved in the instant case.

With respect to *Anne P. Humphrey,* 5 TCM 21 (1946), aff'd 162 F. 2d 853 (C.A. 5th, 1947), cert. den. 332 U.S. 817, cited at pages 35, 38 and 47 of the Commissioner's brief, the opinion reveals that there was no contest on the salvage value point, and that the actual holding on the de-

preciation issue was simply a standard application of the rule laid down in *Virginian Hotel Corporation* v. *Helvering,* 319 U.S. 523 (1943).

In *W. H. Norris Lumber Co., Inc.,* 7 TCM 728 (1948), and *L. A. Davidson,* 12 TCM 1080 (1953), discussed at pages 39-40 of the Commissioner's brief, the court speaks of salvage value determined at the end of useful life defined as petitioner contends, not at the end of the taxpayer's holding period.

With regard to *The Bolta Company,* 4 TCM 1067 (1945), cited at pages 36, 40, 42 and 47 of the Commissioner's brief, the machines in question deteriorated *physically* during a five-year period so as to be *physically* unusable for their basic purpose at the end of that time. The salvage value determined was the value at the end of this period of physical usefulness. The analogous period in the present case is four years.

It is surprising that the Commissioner cites *Commissioner of Internal Revenue* v. *Mutual Fertilizer Co.,* 159 F. 2d 470 (C.C.A. 5th, 1947) (pages 17 and 42 of his brief). In that case, the court outlawed precisely the type of hindsight determination of useful life which the Commissioner is trying to impose in the case at bar.

At least one case cited in the Commissioner's brief directly supports petitioner's contention that salvage value, for depreciation purposes, is junk or scrap value. The Commissioner would have this Court come to an erroneous understanding of the holding in *W. Horace Williams Company, Inc.* v. *Lambert,* 56-2 USTC Para. 9839 (D.C.E.D. La., 1956). The Commissioner's brief states:

> "In that case the salvage value of a particular asset [the barge *Cap,* a converted LST], in 1948 and 1949, was $50,000. In 1950, the tax year in question, the

> salvage value fluctuated from zero to $30,000. The court found that an estimated value of $30,000 was fair and reasonable and the depreciation allowance for 1950 was adjusted accordingly." (Pages 46-47, footnote 27, Commissioner's brief.)

The Commissioner's truncated version of the court's holding in the *Williams Company* case could well produce the impression that the case does not support petitioner's theory of salvage value. Actually, it fully supports petitioner. Finding of Fact No. 29 in that case reads, *in full*:

> "The salvage value of the Barge *Cap* at various times during 1950 ranged from zero to $30,000, *fluctuating with the price of and demand for scrap.*" (Emphasis added.)

We do not believe we need say anything further about that decision.

(6) The Commissioner's brief fails to answer the reasoning implicit in the authorities cited by petitioner.

The proposition that each case turns on its own particular facts is a cliche' that sets the stage for a denial of the relevance of the authorities cited by one's opponent. Thus, on pages 30 and 31 of the Commissioner's brief, he acknowledges our citation of *Sanford Cotton Mills,* 14 BTA 1210 (1929), Acq. X-2 CB 63, *Merkle Broom Co.,* 3 BTA 1084 (1926), Acq. V-2 CB 2, *Max Kurtz, et al.,* 8 BTA 679 (1927), Acq. VII-1 CB 18, *General Securities Co.,* BTA Memo, CCH Dec. 12,500-D (1942), aff'd 137 F. 2d 201 (C. C.A. 6th, 1943), and states that "Since each of the cases turns on its own particular facts, they do not establish a binding precedent for this case."

The Commissioner's brief then proceeds (page 31) with the erroneous observation that in each of these cases "the usual company car or truck situation was involved."

Rather, the reason petitioner cited these cases is that they involved fact situations where the taxpayer disposed of his cars (at substantial prices, too, it was noted in the *General Securities* case) before the general business life of the cars was exhausted. Nevertheless, in each reported instance where such a "particular" factual situation obtained, the Commissioner contended and the court invariably held that the useful life of the cars was coterminous with their general business life and was *not* equivalent to the shorter holding period of the taxpayer.

This principle does not lead to "one rigid formula," as asserted by the Commissioner at page 20 of his brief. We were careful to point out in our opening brief (page 12) that

> "It has long been recognized that the particular operating practice of a taxpayer has important effects on the physical life of an asset. Thus the particular use may shorten the total period of economic usefulness materially—usually through abnormally heavy operation or undermaintenance. To the extent that such operating practice is proved, a particular taxpayer is permitted to adjust his depreciation rate accordingly."

This well-established principle represents a faithful recognition of, and allowance for, the "variables" referred to by the Supreme Court of the United States in *Detroit Edison Company* v. *Commissioner of Internal Revenue,* 319 U.S. 98 (1943).

The "particular fact" of the instant case is that petitioner's holding period for cars, in the taxable years under review, fell short of the useful life of the cars. The cases cited in our opening brief (pages 17-21) and the instant case display the same facts as to useful life. Thus, the cited cases are useful precedents in this case. They indicate to this Court what courts have found the rule to be

in the past—namely, that useful life means the inherent business life of the asset, not the period the particular taxpayer happened to hold the asset.

The Commissioner's failure to explain away his rulings which we cited in our opening brief is equally significant. At page 26 of his brief, he seeks to avoid the impact of O.D. 845, C.B. January-June 1921, page 178 (cited in our opening brief at page 14), by stating:

> "The general proposition quoted from O.D. 845, 4 Cum. Bull. 178 (1921), supports the Tax Court's opinion. [Just how it does this is not indicated.] In reading the office decision, taxpayer overlooks the fact that his cars were acquired for rental-car purposes and have a short useful life in that business."

Obviously, the latter sentence is a good argument only if the Commissioner's definition of "useful life" be assumed!

In the same vein is the Commissioner's discussion of Rev. Rul. 108, 1953-1 CB 185, and Rev. Rul. 54-229, 1954-1 CB 124, at page 27 of his brief. Those rulings concerned the question whether profit upon sale of leased and rented automobiles was taxable at ordinary or capital gains rates. The Commissioner knew (and stated in Rev. Rul. 108) that depreciation was allowable on such automobiles. Since each dollar of depreciation deducted reduced the income tax basis of the automobiles, correspondingly each dollar so deducted increased the profit, for income tax purposes, upon sale. The automobiles which were the subject of those rulings were held for periods of approximately a year or less. If the Commissioner's rationale of useful life in this appeal were correct, why did he not, in those rulings, state that the holding period of those automobiles was their useful life, that the selling price was their salvage value,

and that, therefore, there was no capital gain? Instead, the Commissioner went out of his way to say that the automobiles were sold after having been leased "for periods *substantially less* than their normal useful life." (Emphasis added.)

We repeat: Would the Commissioner contend that his published rulings are loosely drawn, with little or no regard to the language used?

The final comment of the Commissioner (page 31 of his brief) on the cases cited at pages 17-21 of our opening brief, is that the findings in those cases were reasonable, while the use of a four-year life in our case is not. As we indicated in our opening brief, we believe that the Commissioner has used as his index of reasonableness the presence of capital gains upon disposition of the cars. The above-mentioned cases are silent as to gains, if any, upon the sales of the cars by the taxpayers concerned, thus indicating that these courts regarded that point as immaterial. Nevertheless, these cases all involved years well before passage of the Revenue Act of 1942 and the enactment of what became known as Section 117(j) of the 1939 Code. Any gain realized on the sale of depreciable business assets before 1942 was fully taxable at ordinary rates. Is it the Commissioner's position that depreciation methods which were reasonable before 1942 became unreasonable after 1942, without any change in the depreciation statute? May we refer the Court to our discussion (appearing at pages 31-36 of our opening brief) of what we believe to be the Commissioner's real motivations in this field.

(7) The Commissioner's position on "useful life" and "salvage value" under the 1939 Code has been correctly and decisively rejected in recent decisions by the United States District Courts.

The Commissioner's position on the meaning of "useful life" under the 1939 Code has just been thoroughly considered and completely rejected by the United States District Court for the District of Delaware in a decision handed down after submission of petitioner's opening brief herein. This decision is *The Hertz Corporation* (*successor by merger to J. Frank Connor, Inc.*) v. *United States of America,* Civil Action No. 1921, July 17, 1958 (reported at 58-2 USTC Para. 9720).

Although that case involves accelerated depreciation under the 1954 Code, it is a directly applicable authority in the instant case so far as the meaning of useful life is concerned. It should be noted that the business and facts involved in the *Hertz* case are substantially identical to those in the present case.

In the *Hertz* case, as here, the Government insisted that useful life, for depreciation purposes, was the holding period of the particular taxpayer involved. However, for periods prior to issuance of the Commissioner's new depreciation regulations in 1956, the District Court rejected the Government's claim and upheld the taxpayer's contention that useful life meant physical life.

The Court stated:

> "Over the years, 'useful life' has come to be regarded in the field of business and accounting to mean the business life of an asset regardless of whether it passed from one owner to another. *Useful life was meant to be the total life for which the asset was useful for business purposes.* Not only was this the general accounting understanding of the concept of useful life,

but the uncontradicted testimony of expert certified public accountants was that prior to the promulgation by the Commissioner of Internal Revenue of his 1956 regulations on depreciation, their experience with representatives of the Internal Revenue Service was always that the depreciation rate was computed on the basis of the aggregate business life, regardless of changes in the ownership of the asset. . . .

" . . . Insofar as concerns the Revenue Laws, these two terms [useful life and salvage value] had their origin in the attempts by the Department of Internal Revenue and the Courts to set up a proper standard for the deduction of a reasonable allowance for depreciation. . . .

"But neither the Congress nor the Department gave an official definition of 'useful life' and 'salvage value.' Consequently, like Topsy, their meaning just 'growed'. *Based upon accepted accounting principles, 'useful life' came to mean the period over which the particular piece of property was capable of performing the task for which it was created. In other words, it was the whole physical life of the asset, not just in the hands of a particular taxpayer, which determined its 'useful life'. And, over the years, 'salvage value' became generally defined as scrap value, or the remainder left in the asset when it was worn out. . . .*

" . . . The Department joins issue raising the first question for disposition, namely, does useful life mean the life of the asset as long as it is used by the taxpayer or its whole life?

"The Commissioner's argument is based in the main upon three grounds. First, he says that the tax laws for many years have permitted a 'reasonable allowance' for depreciation, as a result of which the Department is vested with broad authority to promulgate regulations governing the taking of depreciation. Secondly, he contends that the term 'useful life' is but one of the elements of depreciation and means, not the whole physical life of the asset, but its useful life in

the taxpayer's business. . . . Thirdly, he says that to construe the phrase 'useful life' as the whole physical life of the asset would have the effect of distorting the long-settled concept of depreciation which, insofar as concerns the tax laws, has meant from its inception a reasonable allowance, or sum, which should be set aside annually in order that at the end of the useful life of the asset, the aggregate of the sums set aside will, together with salvage value, equal its original cost. *Detroit Edison Co.* v. *Commissioner,* 319 U.S. 98. To construe 'useful life' as the whole physical life of the asset, the Commissioner argues, permits taxpayers in businesses having a rapid turnover of assets to sell a comparatively new asset at a relatively high price and treat the difference between the sale price and junk salvage value as capital gains rather than income, resulting in a tax avoidance scheme of some magnitude. . . .

"But the Commissioner's argument glosses over . . important aspects of this case. *First, regardless of their original meaning, by* 1954 *'useful life' meant the whole physical life of the asset. . . .*

"I accept the testimony of accountants from nationally recognized firms that *by* 1954, *the phrase 'useful life' was taken in business and accounting circles to mean the whole physical life of the asset and that the useful life of an automobile used in a business was four years.* Their testimony was virtually unchallenged on cross-examination and the Commissioner offered no testimony in his own behalf. . . .

" . . . For years, the Treasury Department's Bulletin F (Rev. Jan. 1942) defining the Department's general depreciation policy and tables of estimated lives of certain assets has used this language:

> 'The Federal income tax in general is based upon net income of a specified period designated as the taxable year. The production of net income usually involves the use of capital assets which wear out, become exhausted, or are exhausted, or are

> consumed in such use. The wearing out, exhaustion, or consumption usually is gradual, extending over a period of years. *It is ordinarily called depreciation, and the period over which it extends is the normal useful life of the asset.'* (Emphasis added.)

This bulletin goes on to recommend to taxpayers that for depreciation purposes, they assign a three year life to business cars and a five year life to pleasure cars. In Rev. Rul. 108, 1953-1 C.B. 185, the Commissioner referred to the practice of selling automobiles after 'leasing them for substantially less than their normal useful lives.' Compare also Rev. Rul. 54-229, 1954-1 C.B. 124, which uses substantially this same language.

. . .

"All of this fairly confirms the testimony of the accountants that the Commissioner, himself, in the great majority of cases was interpreting 'useful life' as the whole useful life of the asset and accepting the useful life of an automobile used in a business as four years.

"The attitude of the Courts with reference to the meaning of 'useful life' prior to the passage by Congress of the 1954 Code is a proper subject for consideration here. In the following cases, the Board of Tax Appeals conceded a four year useful life to the business automobiles of the taxpayer despite its practice of disposing of them in less than three years. *Re Sanford Cotton Mills,* 14 BTA 1210 (1929); *Re Merkle Broom Co.,* 3 BTA 1084 (1926); *Re Max Kurtz et al.,* 8 BTA 679 (1927).

"In *General Securities Co.,* BTA Memo, CCH Dec. 12,500-D (1942), aff'd 137 F. 2d 201 (C.C.A. 6th, 1943), the Board said this:

> 'In its business petitioner used one or two automobiles in which its agents traveled over territory located in all of the southern states. Each automobile traveled some 60,000 to 75,000 miles a year.

> Petitioner kept his automobiles from one to two years. When petitioner traded its cars in after one year, from a value standpoint, they had a third to a half of their original value left. The normal useful life of automobiles used by petitioner in its business was three years.' (BTA Memo, CCH Dec. 12,500-D, at 37,941.)

"*Pilot Freight Carriers, Inc.,* 15 TCM 1027 (1956) and *Massey Motors, Inc.* v. *United States,* 156 F. Supp. 516 (D.C.S.D. Fla. (1957)) are recent decisions of lower Courts reaching the same result. In the brief of the Commissioner in *Philber Equipment Corporation* v. *Commissioner,* 237 F. 2d 129 (3rd C. 1956), this significant language is used by counsel for the Government:

> 'Because of existing conditions [taxpayer] knew when it purchased equipment that it would likely be able to rent such equipment only for a period that was *substantially less than its useful life.*' (Emphasis added.)

Other cases illustrate the same distinction between useful life of an asset in the business and its whole, physical life: *West Virginia & Pennsylvania Coal & Coke Co.,* 1 BTA 790 (1925); *W. N. Foster, et al.,* 2 TCM 595 (1943); *Nat Lewis,* 13 TCM 1167 (1954). *It is safe to say that prior to the passage of the* 1954 *Act, a fairly steady line of lower court decisions had emerged recognizing 'useful life' as a word of art meaning the whole physical life of the asset. . . .* " (Emphasis added.)

—

The District Court's opinion is significant in this appeal not only for its analysis of the term "useful life", but for its references to the Tax Court's opinion below:

> "Except for *Evans* v. *Commissioner of Internal Revenue,* 16 CCH Tax Ct. Mem. 156 (July 31, 1957), where the Tax Court held for the Government in respect to

the salvage value question *without, however, assigning any reasons for its conclusions,* this case is one of first instance." (Emphasis added.)

" . . .

"The Commissioner relies chiefly on the decision of the Tax Court in Robley H. Evans, elsewhere cited, where the Court held that a salvage value based upon the estimated proceeds of the disposition of the asset at the end of its useful life in the taxpayer's hand should be taken into consideration. *The force of the decision is blunted because it gives no reasons for the result.*" (Emphasis added.)

In addition, very recent decisions of the United States District Court for the Southern District of Florida confirm in all respects the petitioner's views of useful life and salvage value.

In *Davidson* v. *Tomlinson,* Civil Action No. 3609, decided July 23, 1958 (reported at 58-2 USTC Para. 9739), the facts, virtually identical to those at bar, were as follows:

The taxpayer, a partnership known as U-Drive Autos (whose name was later changed to National Car Rentals), was engaged during the taxable years 1950, 1951, 1952 and 1953 in leasing and renting automobiles and trucks on a daily, weekly, monthly or yearly basis.

The taxpayer purchased cars and trucks only as it had need to fulfill the requirements of its business, and, particularly, on the basis of the coming and going of the winter tourist season.

The taxpayer kept most of its cars in service for approximately one year, although some were kept longer and some were kept less than that period of time. Vehicles were sold for substantial amounts when taxpayer decided to dispose of them.

The Court held:

> "National Car Rentals depreciated its rental cars and trucks (other than Patrol cars) on the straight line method, utilizing an estimated useful life of three years with a $50.00 salvage value. The cars leased to the Duval County Road Patrol [on an annual basis] were depreciated on an estimated useful life of 24 months. The Court finds these methods and rates to be reasonable and fair."

Further, in a companion case decided the same day, *Lynch-Davidson Motors, Inc.* v. *Tomlinson,* Civil Action No. 3610 (reported at 58-2 USTC Para. 9738), the taxpayer, an automobile and truck dealership, used a three-year useful life, with $50 salvage value, in depreciating company cars (which term, the court noted, it was using to include trucks). The taxpayer "followed the practice of disposing of the company cars when the new models were brought out by the manufacturer." During the taxable year under review (the fiscal year ended May 31, 1949), the taxpayer sold a total of 17 company cars, nine of which were held more than six months and eight of which were held less than six months. It is noteworthy that of the nine held for more than six months the *profit alone* was $2,388.60, indicating sales prices of substantial amounts.

The court held:

> "The plaintiff is entitled to the depreciation claimed on its company cars as shown by its corporate income tax return [three-year useful life with $50 salvage value]. . . ."

CONCLUSION.

We have cited many authorities (including decisions expressly acquiesced in by the Commissioner and rulings which he himself issued) to sustain the proposition that the long-accepted meaning of "useful life" is the physical or functional life of the asset. That life is reasonably determinable. The taxpayer's intentions for the disposition of the asset some years in the future are never reasonably determinable today.

The Commissioner has not presented a single authority to sustain his definition of "useful life". Since "salvage value" is the residual value at the end of "useful life," the Commissioner's failure to support his definition of "useful life" carries with it a corresponding failure to support his definition of "salvage value."

The analysis in our first brief has been fully confirmed by the three recent decisions of the United States District Courts in Delaware and Florida, two of them involving the very business under review in the case at bar.

For the reasons set forth in our briefs, we respectfully submit that the Tax Court's conclusions herein with respect to allowable automobile depreciation during 1950 and 1951

should be reversed, and that the depreciation allowance claimed in petitioner's returns for those years should be sustained.

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No. 15,986

IN THE

United States Court of Appeals

For the Ninth Circuit

ELRICK RIM COMPANY, a copartnership consisting of M. C. Elrick and M. B. Champlin,

Appellant,

vs.

READING TIRE MACHINERY CO., INC., a corporation, and RALPH R. READING, an individual,

Appellees.

BRIEF ON BEHALF OF APPELLANT, ELRICK RIM COMPANY, A COPARTNERSHIP CONSISTING OF M. C. ELRICK AND M. B. CHAMPLIN.

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No. 15,986

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STATEMENT OF THE PLEADINGS AND JURISDICTION.

This action was commenced in the United States District Court for the Southern District of California, Central Division, by the filing of a Complaint under the provisions of the Declaratory Judgments Act (28 U.S.C., Section 2201), wherein it was prayed that United States Letters Patent No. 2,721,148 (R. 703) owned by appellee,

Ralph R. Reading, be declared invalid and not infringed by the use of a spray device and the process performed by its use that was manufactured, sold and used by appellant. Further, appellant prayed that Reading Tire Machinery Co., Inc. and Ralph R. Reading be enjoined from, among other things, threatening any of appellant's customers, distributors, dealers or users or prospective customers, distributors, dealers or users of appellant's device with patent infringement because of the use of any spray device manufactured or sold by appellant.

Appellees filed an Answer and Counterclaim for Patent Infringement (R. 19), and appellant filed an Answer to Counterclaim (R. 25).

The United States District Court had jurisdiction under the Federal Declaratory Judgments Act, Title 28, U. S. Code, Section 2201, and the patent laws of the United States.

The District Court found in favor of appellees, holding the patent valid and infringed by appellant and entered its Findings Of Fact, Conclusions Of Law and Judgment on December 24, 1957. On January 20, 1958, within thirty (30) days following the entry of the Judgment, appellant filed its Notice of Appeal (R. 66), an Appeal Bond (R. 68), its Designation of Contents of Record on Appeal and its Concise Statement Of Points On Which Plaintiff and Counterdefendant Intends To Rely On Appeal (R. 699).

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1291.

THE PARTIES.

The appellant, Elrick Rim Company, was a copartnership consisting of M. C. Elrick and M. B. Champlin, both residents of Hayward, California, having its principal place of business at Hayward, California. Since the filing of the Complaint herein, said Elrick Rim Company has become a California corporation, having its principal place of business at Hayward, California.

Appellee, Reading Tire Machinery Co., Inc., is a California corporation, having its principal place of business at Hawthorne, California. Appellee, Ralph R. Reading, is an individual residing at Hawthorne, California, and is the patentee and owner of Letters Patent No. 2,721,148. Reading Tire Machinery Co., Inc., is the exclusive licensee of said Letters Patent under an oral license.

CONCISE STATEMENT OF THE CASE.

This is a suit for patent infringement involving Reading Letters Patent No. 2,721,148 which covers a process for spray painting rubber cement onto a surface.

This suit originated under the Declaratory Judgments Act (28 U. S. Code, Section 2201), wherein appellant, after receiving a notice of infringement from appellees (R. 863), sought a declaration that said Letters Patent No. 2,721,148 was invalid and not infringed.

The process of spray painting of the patent in suit is employed in the retreading of truck and automobile tires. When a tire is to be retreaded, the first step is to buff off the old tread of the tire. When this step is completed,

the tread surface of the tire is fairly rough. The next step in retreading is to coat this buffed surface of the tire with rubber cement. The purpose of this step of coating rubber cement on the tire is merely to apply to the surface of a tire a cement that will hold the camelback or tread rubber on the tire carcass during the remaining steps of the retreading process. Camelback is then applied to this coated surface. An inner tube is then put into the casing and a so-called curing rim is also placed inside the casing. The tire is then put into a curing mold, inflated to about 130 pounds pressure, and heat to about 300° F. is applied to this mold for about one hour and to the camelback until the camelback is cured.[1]

The process of the Reading patent in suit is employed to spray rubber cement onto the buffed surface of the tire carcass for holding the camelback in place during the succeeding steps of the retreading process.

Appellant manufactured, sold and used an old and well-known pressure paint spray pot device for spraying rubber cement. Appellant placed rubber cement in the old spray pot and then said spray pot was used in this normal operating manner to spray the rubber cement onto the buffed surface of the tire carcass. This old established process of spray painting employed, resulting from the ordinary use of this old paint spray pot, is the process that is here charged to infringe the Reading patent in suit.

Appellee Ralph R. Reading, after securing his patent No. 2,721,148 on October 18, 1955, sent a notice of infringe-

[1]These pressures and temperatures are used in retreading tires for passenger cars; on truck tires higher pressures are employed.

ment to appellant, as well as to many of appellant's dealers and users, advising them that the use of the spray equipment manufactured and sold by appellant was an infringement of said Patent No. 2,721,148. Shortly after this wholesale notice of infringement to appellant's customers, appellee, Reading Tire Machinery Co., Inc., published an announcement in the Tire, Battery & Accessory News of January 1956, giving the trade in general notice of infringement (R. 17). This trade magazine is read by practically every one in the retreading industry (R. 231), and this advertisement resulted in injury to appellant's business (R. 246-247).

A justiciable controversy existing between appellant and appellees, appellant filed its Complaint under the Declaratory Judgments Act to resolve said controversy.

Long prior to the filing by appellee, Ralph R. Reading, of an application for Letters Patent, the process of spraying rubber cement on the buffed surface of a tire carcass, during the retreading of tires, had been publicly used. These prior public uses were substantially identical to the process of the Reading patent and were for the identical purpose. Said prior uses were employed by W. S. Cahill and D. S. Hartman, both of Danville, Virginia, witness on behalf of appellant (R. 613 and 670), and also by appellee, Ralph R. Reading, himself (R. 363).

W. S. Cahill, as early as January 1953, publicly and commercially used a process for spraying rubber cement that was substantially identical to the process of the patent in suit. Thereafter, on June 17, 1953, Cahill filed an application for Letters Patent on his process and apparatus, and Letters Patent No. 2,758,037 (R. 769) was

issued therefor on August 7, 1956. Said Cahill patent is pleaded as prior art (R. 30-31) and relied upon herein as an anticipatory reference.

D. S. Hartman, of Danville, Virginia, secured a Cahill spray device on February 7, 1953 (R. 625) and has used this device in practicing a process of spraying rubber cement on tires ever since (R. 677). Cahill also sold these devices for practicing a method of spraying rubber cement prior to a year before Reading filed his application for Letters Patent (R. 627-628, Exs. 11 and 12, R. 837-839).

Appellee, Ralph R. Reading, admitted on cross-examination (R. 364) that he used substantially the identical process in his tire retreading shop from the end of 1951 to October 1953 (R. 347-348), and during this period he sold, in the regular course of his business, at least 300 to 400 tires a month wherein said process was employed (R. 352-353). Thus, there were between 6600 and 8800 tires retreaded and sold by Mr. Reading during this period wherein rubber cement was applied to the tire by this prior spray process.

In addition to the prior public uses of Cahill, Hartman and Reading and the prior Cahill patent, the spray painting devices disclosed in the prior art patents to Gradolph No. 1,318,863 (R. 753, Ex. 4), McLean, et al., No. 1,395,965 (R. 759, Ex. 4) and Shelburne No. 1,710,435 (R. 765, Ex. 4), have a normal operating process of spray painting identical to the Reading patented process. It was admitted by appellees' expert, on cross-examination (R. 427-431), that if rubber cement and solvent were placed in the tanks of the spray devices disclosed in said prior art

patents to Shelburne (R. 765) and Gradolph (R. 753), and these spray devices operated in accordance with the normal operating process disclosed in said patents, the process of the Reading patent in suit would be employed.

The trial court, in reaching the decision that the Reading patent in suit was valid, completely disregarded the above noted evidence respecting the prior uses of Cahill, Hartman and Reading, because in its Findings Of Fact (Finding IV) the Court found that the method employed to place rubber cement on the buffed surface of tire carcasses, immediately prior to the invention of the Reading patent in suit, was by painting a thick coating of rubber cement on the tire with a brush. This Finding by the District Court is completely contrary to the evidence and is clearly erroneous.

The evidence also establishes that appellant's process is not an infringement of the process of the Reading patent in suit because the only teaching of the Reading patent is that the cement in the tank of the Reading device is subjected to an initial pressure of at least 40 pounds to the square inch and thereafter reducing this pressure to an application pressure of 15 pounds to the square inch (Reading patent Ex. 1, Col. 4, lines 5 to 27, R. 706, Reading cross-examination R. 362). This initial pressure of 40 pounds is important, according to the teachings of the Reading patent, because by this high initial pressure and subsequent reduction of pressure, the rubber cement in the tank becomes emulsified or, as testified to, becomes a solution that is supersaturated with small air bubbles (Petersen, R. 512-513; Stringfield, R. 410).

Appellant's process does not employ a method wherein there is an initial pressure of 40 pounds per square inch and then a reduction of that pressure to 15 pounds per square inch but, on the contrary, as admitted by appellees' expert, appellant, at no time in its process uses a pressure of over 10 pounds per square inch (R. 435-436). The only evidence is that the initial pressure and the normal operating or application pressure employed in appellant's process is a constant, uniform pressure of 10 pounds per square inch. The testimony establishes that by using only a pressure of 10 pounds per square inch, the rubber cement in the tank of appellant's device is not emulsified (Wolk, R. 107, Stringfield, R. 444 and Petersen R. 512), and does not become a solution supersaturated with air bubbles (Petersen, R. 512). Therefore, with the omission in appellant's process of the step of charging the rubber in the tank with an initial pressure of 40 pounds and thereafter reducing the pressure to 15 pounds, there can be no infringement of the Reading patent in suit.

The evidence clearly establishes that spraying rubber cement is old. Therefore, if appellant's process of spraying rubber cement is an infringement of the patent in suit, then the process resulting from the normal operation of the devices disclosed in the prior art patents to Shelburne No. 1,710,435 and to Gradolph No. 1,318,863, and the prior uses of Cahill and Hartman, would also be an infringement of the claims of the Reading patent in suit and, Reading therefore, is invalid and under the old axiom "That which infringes if later anticipates if earlier."

In addition to awarding damages, an injunction and costs to appellees, the District Court awarded to appellees attorneys' fees in the amount of Seven Thousand Five Hundred Dollars ($7500.00). This award was made even though appellees precipitated this suit, under the provisions of the Declaratory Judgments Act (28 U.S.C. 2201), by serving a notice of infringement on appellant. The only thing appellant did, after receiving notice of infringement, was to proceed in the normal manner prescribed by said Declaratory Judgments Act and file suit to settle the controversy. The District Judge, by awarding attorneys' fees, penalizes appellant for following a procedure prescribed by statute for the protection of its rights.

ASSIGNMENT OF ERRORS.

1. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law in that said claims do not define a patentable invention.

2. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law in that only mechanical skill was required to produce the process defined in said claims.

3. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law in that the process defined in said claims was anticipated by the prior art.

4. The District Court erred in not holding that Reading did not invent a new "process" but merely followed the teachings of the prior art.

5. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law in that said claims define nothing more than the function of a machine.

6. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law because of prior public use.

7. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law because of prior knowledge.

8. The District Court erred in not holding the claims of the patent in suit and each of them invalid in law in that they do not particularly point out and distinctly claim an identifiable invention as required by the statutes and law of the United States.

9. The District Court erred in holding that the appellant infringed each of the claims of the patent in suit.

10. The District Court erred in holding that the appellant infringed each of the claims of the patent in suit by manufacturing, selling and using spray devices in that the process employed in the use of the appellant's spray device is substantially different than the process described and claimed in the patent in suit and is not the equivalent thereof.

11. The District Court erred in holding that the appellant infringed each of the claims of the patent in suit because the spray process practiced by it follows the teachings of the prior art and not the patent in suit, and, consequently, cannot infringe the claims of the patent in suit.

12. The District Court erred in holding that the appellant infringed each of the claims of the patent in suit because if said claims are construed to include the process practiced by the said appellant, then the claims also include the prior art and are invalid.

13. The District Court erred in not holding that the process described and claimed in the patent in suit must be limited to the precise steps described in the specification of said patent and the equivalents thereof, and when so interpreted, the accused process is not infringement thereof.

14. The District Court erred in awarding attorneys' fees to appellees.

15. The District Court erred in awarding the sum of Seven Thousand Five Hundred Dollars ($7500.00) to appellees as attorneys' fees in that, under the circumstances attending the action, such an award is excessive and unreasonable.

16. The Findings of Fact made and entered herein by the District Court are not in accordance with the facts as established by the evidence and are clearly erroneous.

17. The District Court erred in refusing relief to appellant on the grounds that appellees were guilty of unfair competition.

18. The District Court erred in dismissing the Complaint.

THE CLAIMS OF THE PATENT IN SUIT DO NOT DEFINE A PATENTABLE INVENTION.

Does Reading's invention measure up to the standard of invention as it is written into the Constitution and

applied by the Supreme Court and by this Court? It is submitted that it does not.

Simply stated, the Reading invention covers nothing more than an old process of spray paintiff, wherein the material sprayed is a mixture of rubber cement and a petroleum solvent and has air entrained in said mixture; mixing said cement, solvent and air with an independent stream of air by means of an ordinary spray gun and directing the resultant mixture onto a surface to form a thin uniform coating.

This is nothing more than an old process of spray painting, used for years and years in the spray painting art. The evidence establishes that the process of spraying rubber cement was old long before Reading developed his patented process. Such old processes are found in the Cahill Patent No. 2,758,137 (Ex. 4, R. 769), the Cahill and Hartman prior uses (R. 613 to 695) and the Reading prior use (R. 363). The evidence also establishes that in these prior processes the mixture of rubber cement and solvent had air entrained therein, due to the absorption of air by the cement and to the air pressure used in the spray pot employed (R. 354, 451). Thus, the resulting mixture of cement sprayed in the prior art was substantially identical to that of the patented process. The possible difference is a difference in degree only and is not an invention. This Court has so held in the case of *Elliott Core Drilling Co. v. Smith,* 50 F. 2d 813, 816, where it said the following:

> "A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the

same means, with better results, is not such an invention as will sustain a patent. * * *''

Just what did Reading do over and above this prior art to warrant a patent? The answer to this is that Reading actually did nothing more than select from the prior art an old paint spray pot that employed an air inlet tube that extended into the pot with the open end of said air inlet tube adjacent the bottom of the pot, and employ the method resulting from the use of this pot to spray rubber cement. There was nothing new in such a device or in the method of use of such a device because the Shelburne Patent No. 1,710,435 of 1929 (Ex. 4, R. 765) discloses a paint spray pot identical in construction, mode of operation and result as that employed in the Reading process. It can hardly be said that this act of selection of an old well-known spray pot measures up to the standard of invention set by the Constitution and the Courts.

This Court in its recent decision in the case of *Oriental Foods, Inc. v. Chun King Sales, Inc.,* 244 F. 2d 909, 913, had occasion to review the standard of invention necessary for valid patent protection in connection with a process. In that case this Court said:

> ''The mere fact that the device may make the wrapping of the cans easier to accomplish does not, in and of itself justify a claim of invention. As the District of Columbia Circuit held in a recent decision:
>
> > 'A mere advance in efficiency and utility is not enough to convert a non-inventive aggregation into a patentable combination.';
>
> citing the Kwikset Locks, Inc., v. Hillgren case, 1954, 210 F. 2d 483 of this Circuit.

The standard of invention is written into the Constitution. The Supreme Court has held that the determination by the trial court of the question of invention need not be accorded the respect given ordinary findings of fact. Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., supra, concurring opinion, 340 U.S. at pages 155-156, 71 S. Ct. at pages 131-132. See also Crest Specialty v. Trager, 341 U.S. 912, 71 S. Ct. 733, 95 L. Ed. 1349, where the Supreme Court, by per curiam opinion, summarily held invalid a patent previously upheld by the district and circuit courts. This Court has only recently reaffirmed its long held position that the question of novelty and invention is one of fact as to which the conventional clearly erroneous test is applicable. Hall v. Wright, 9 Cir., 240 F. 2d 787. We are not disposed to modify our statement of the test applicable on appellate review. This is not a case involving disputed evidence or the credibility of witnesses. The prime evidence is documentary, and is before this Court. Under such circumstances we have a greater discretion in deciding the validity of the patent in question. Sales Affiliates, Inc., v. National Mineral Co., 7 Cir., 172 F. 2d 608. We believe that the patent involved in the instant cause rightfully belongs, to use the words of Justice Douglas, among the 'list of incredible patents which the Patent Office has spawned.' 340 U.S. at page 158, 71 S. Ct. at page 133. It is a trifling device at best. It makes no substantial contribution to the advancement of the arts. And certainly it lacks that 'flash of genius' that the patent laws seek, if not require.

The words of Justice Bradley in Atlantic Works v. Brady, 107 U.S. 192, 200, 2 S. Ct. 225, 231, 27 L. Ed. 438, are especially apt:

'It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.'

As Justice Douglas stated in his concurring opinion in the Great Atlantic & Pacific Tea Co. case,

'The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge.

* * * * * * *

'The fact that a patent as flimsy and as spurious as this one has to be brought all the way to this court to be declared invalid dramatically illustrates how far our patent system frequently departs from

the constitutional standards which are supposed to govern.' 340 U.S. at pages 156, 158, 71 S. Ct. at page 132.

We conclude that the Paulucci patent cannot be sustained. Placed aside the Constitutional criteria for invention, this device does not measure up. In coming to this conclusion we follow Kwikset Locks, Inc., v. Hillgren, supra, having in mind Coleman Company v. Holly Mfg. Co., 9 Cir., 1956, 233 F 2d 71, 80."

Another decision of this Court that is in point is *Gomez, et al. v. Granat Bros., et al.,* 177 F. 2d 266, 268 (C.A. 9), wherein the Court said:

"Granat did not invent nor discover the finger ring ensemble with interlocking relationship; neither did he invent nor discover the dovetail joint. He used the dove-tail joint as a means of interlocking the two rings. As said by the court in Dow Chemical Co. v. Halliburton Oil Well Cementing Co., supra, (324 U.S. 320, 65 S. Ct. 650). 'He who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge.' "

Reviewing the present case in the light of the *Gomez* decision, Reading did not invent nor discover the spraying of rubber cement; neither did he invent nor discover the process of spraying. He used the process inherent in the spray pot disclosed in the Shelburne patent as the means of spraying rubber cement. Both the process inherent in

the operation of the spray pot of Shelburne and the spraying of rubber cement were in the public domain. Reading was merely utilizing the existing fund of public knowledge for an obvious purpose. *Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge.*[2]

Another case in which the Court of Appeals for the Ninth Circuit ruled that an invention must be something more than new and useful in order to be subject to patent protection is *Schick Service, Inc. et al. v. Jones,* 173 F. 2d 969, 974, where the Court said:

> "* * * Even though the functions performed by the combination be new and useful, this does not make the device patentable, for it must also be invention and/or discovery. There must be ingenuity over and above mechanical skill. These features have been used in a similar fashion in earlier patented devices. * * *"

See also the case of *Palmer v. Kaye,* 185 F. 2d 330, 332 (C.A. 9), where this Court said:

> "We think the improvement is one within the rule stated in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 90, 62 S. Ct. 37, 40, 86 L. Ed. 58, as follows: 'We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C. § 31, R.S. § 4886, the device must not only be "new and useful", it must also be an "invention" or "discovery". Thompson v. Boisselier, 114 U.S. 1, 11, 5 S. Ct. 1042, 1047, 29 L.

[2]All emphasis ours unless otherwise noted.

> Ed. 76. Since Hotchkiss's Ex'x. v. Greenwood, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art * * *. That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.'
>
> "We think that what Palmer did here was not invention, but a mere exercise of the skill of the calling, and an advance plainly indicated by the prior art."

Another expression of the rule by the Supreme Court is found in *Sinclair & Carroll Co., Inc., v. Interchemical Corporation,* 325 U.S. 331, 65 S. Ct. 1143-1145, where the Court said:

> "A long line of cases has held it to be an essential requirement for the validity of a patent that the subject-matter display 'invention', 'more ingenuity * * * than the work of a mechanic skilled in the art.' Hicks v. Kelsey, 18 Wall. 670, 21 L.Ed. 852; Slawson v. Grand Street R. Co., 107 U.S. 649, 2 S. Ct. 663, 27 L. Ed. 576; Phillips v. Detroit, 111 U.S. 604, 4 S. Ct. 580, 28 L. Ed. 532; Morris v. McMillin, 112 U.S. 244, 5 S. Ct. 218, 28 L. Ed. 702; Saranac Automatic Machine Corp. v. Wirebounds Patents Co., 282 U.S. 704, 51 S. Ct. 232, 75 L. Ed. 634; Honolulu Oil Corp. v. Halliburton, 306 U.S. 550, 59 S. Ct. 662, 83 L. Ed. 980; Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 90, 62 S. Ct. 37, 40, 86 L. Ed. 58. This test is often difficult to apply; but its purpose is clear. Under this test, some substan-

> tial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee. Whether or not those efforts are of a special kind does not concern us. The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure. See Hartford Empire Co. v. United States, 323 U.S. 386, 65 S. Ct. 373, at page 395."

All Reading did was to take the device of Fig. 3 of the Shelburne patent, place therein rubber cement and solvent and then employ said device in its ordinary method of operation. It is submitted that this is not invention. To establish this we apply the well-known rule expressed by this Court in the case of *Pierce v. Muehleisen,* 226 F. 2d 200, 204, where the following was said:

> "We do no more than recite a well established rule of law when we say the application of an old process to analogous material of foreseeably similar character is not a sufficient contribution to the science to justify the award of a patent monopoly. It is only the achievement of the inventive faculty, as opposed to the product of the exercise of ordinary professional skill, that entitles the researcher to a patent. 35 U.S.C.A. § 103, Mandel Bros. v. Wallace, 335 U.S. 291, 69 S. Ct. 73, 93 L. Ed. 12; General Electric Co. v. Wabash Appliance Corp., 304 U.S. 364, 58 S. Ct. 899, 82 L. Ed. 1402; see also, Standard Brands v. National Grain Yeast Corp., 308 U.S. 34, 60 S. Ct. 27, 84 L. Ed. 17; Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U.S. 464, 55 S. Ct. 449, 79 L. Ed. 997; and, Pennsylvania Railroad Co. v. Loco-

motive Engineer Safety Truck Co., 110 U.S. 490, 4 S. Ct. 220, 28 L. Ed. 222."

It is obvious that Reading did not make an invention subject to patent protection under the rules as stated by the statutes of the United States or the interpretation of said statutes by the Courts.

The Reading patent, if sustained, will withdraw from the public domain the use of spray processes that have long been known and used by the public, spray processes and devices that have been previously used long prior to Reading. Such a result is not the intent nor is it the purpose of the patent laws. The Reading patent just does not measure up to the standard of invention.

APPELLANT, RALPH R. READING, BY USING AN OLD AND WELL-KNOWN PAINT SPRAY POT IN THE CUSTOMARY MANNER TO SPRAY RUBBER CEMENT, DID NOT MAKE A PATENTABLE INVENTION.

The Reading patent was not the first disclosure of spraying rubber cement on a tire carcass during the retreading process to hold the camelback in place. Reading did not file an application for Letters Patent until July 23, 1954, which was long after rubber cement had first been sprayed on tire carcasses to hold the camelback in place. The evidence establishes that W. S. Cahill, of Danville, Virginia, developed a method of spraying tire carcasses with rubber cement during the retreading process as early as January 1953 (R. 615). Cahill, in addition to using a spray of rubber cement, employed oscillating brushes to assist in spreading the rubber cement on the

tire carcass (R. 619). Cahill gave one of his devices for spraying rubber cement to Hartman on February 7, 1953 (R. 625), and the evidence establishes that ever since said date Hartman has employed this machine in spraying tire carcasses with rubber cement during the retreading process (R. 675).

Exhibit 16 establishes that from February 7, 1953, to approximately July 23, 1954, Hartman, in the regular course of his business, employed this Cahill spray method on some 4,658 tires (R. 676). Both Cahill and Hartman testified that the tires retreaded by this Cahill process were satisfactory and also that the benefits derived from the use of this process were identical to those claimed by Reading (R. 646-647 and 688-689). The only difference between the Cahill method of spraying and the claims of the Reading patent here involved is that Cahill does not emulsify the rubber cement as emulsification as defined by Reading. By the same token, Elrick Rim Company does not emulsify its rubber cement in the practice of the Elrick process of spraying rubber cement.

Mr. Reading, in his testimony, admitted that he began the use of spraying rubber cement on tire carcasses during the retreading process during the latter part of 1951 (R. 350). The only difference between the spray process practiced by Reading in 1951 and the claims of the Reading patent here in suit is that in the early Reading process the rubber cement was not emulsified as defined by the Reading patent (R. 364). Mr. Reading used his spray process from the latter part of 1951 to September 1953 (R. 352). During this time Mr. Reading used this spray process in the regular course of his tire retreading busi-

ness and retreaded between 300 and 400 tires a month by use of this process (R. 352-353).

The following statement from the case of *Delco Chemicals, Inc. v. Cee-Bee Chemical Co., Inc.,* 157 F. Supp. 583, 590, wherein the Court there quoted from a 9th Circuit case, is apropos of these prior uses above discussed:

> "Even if it be said that there appears no 'strict anticipation' of the patent in suit, and that the method involves some novelty, it nonetheless lacks invention. As Judge Fee stated for the Court in Stauffer v. Slenderella Systems of California, Inc., 9 Cir., 1957, ... F. 2d .....: 'The advances in the prior art may be such that, although there is no strict anticipation and even though the * * * [methods] involved may not be similar, a trained mechanic would, if presented with the problem, solve it without difficulty.' "

This so-called emulsification is not new because the Shelburne patent discloses a device that is identical in construction, mode of operation and resulting process of use to the Elrick device. The Elrick method here charged to be an infringement is a method that would be employed in the normal method of operating the Shelburne device. Therefore, at the time Reading applied for a patent on his process, there was nothing left for him to invent with respect to said process because it was old to spray rubber cement on tire carcasses, and it was old to emulsify or agitate by passing air through a solution contained in a paint spray pot and then spray said solution onto a surface.

Mr. Stringfield, expert for appellees, had to admit on cross-examination that if rubber cement were placed into

the tank of the Shelburne patent and the Shelburne device operated in the method disclosed in said patent, that one, by adjustment of pressures, would be practicing the Reading process (R. 427-430). Certainly, it does not amount to invention to substitute in a paint spray pot rubber cement for paint and to adjust pressures. Any mechanic, in using any spray pot, adjusts the pressures of air employed.

The alleged invention made by Reading does not measure up to the tests of invention as stated by the Supreme Court and by this Court.

The Supreme Court in the case of *Lovell Manufacturing Co. v. Cary,* 147 U.S. 623, 13 S.Ct. 472, 476, said:

> "* * * But it does not amount to invention to discover that an old process is better in its results, when applied to a new working, than would have been expected; the difference between its prior working and the new working being only one of degree, and not one of kind. It has been often held that the mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defense to a charge of infringement. It follows necessarily that the public cannot be deprived of an old process because some one has discovered that it is capable of producing a better result, or has a wider range of use than was before known.
>
> In Smith v. Nichols, 21 Wall. 112, it was held that a mere carrying forward, or new or more extended application, of the original thought; a change only in form, proportions, or degree; the substitution of equivalents; doing substantially the same thing in the same way, by substantially the same means, with bet-

ter results,—was not such invention as would sustain a patent; and in Roberts v. Ryer, 91 U.S. 150, it was held that it was no new invention to use an old machine for a new purpose, and that the inventor of a machine was entitled to the benefit of all the uses to which it could be put, no matter whether he had conceived the idea of the use or not."

See also:

Sinclair & Carroll Co., Inc. v. Interchemical Corporation, 325 U.S. 327, 65 S. Ct. 1143, 1145.

This Court of Appeals in the case of *R. G. Le Tourneau, Inc. v. Gar Wood Industries, Inc.,* 151 F. 2d 432, 434 (C.A. 9), said:

"As the Supreme Court explained in Cuno Engineering Corporation v. Automotive Devices Corporation, 1941, 314 U.S. 84, 90, 62 S. Ct. 37, 40, 86 L. Ed. 58: 'We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C. § 31, 35 U.S.C.A. § 31, R.S. § 4886, the device must not only be "new and useful," it must also be an "invention" or "discovery." * * * Since Hotchkiss v. Greenwood, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.' The court stated further, 314 U.S. at page 91, 62 S. Ct. at page 41, 86 L. Ed. 58, 'A new application of an old device may not be patented if the "result claimed as new is the same in character as the original result" * * * even though the new result had not before been contemplated.' "

In considering the application of an old process to an analogous material of foreseeable character, such as Reading did in spraying rubber cement by an old and well-known process, this Court of Appeals in the case of *Pierce v. Muehleisen,* 226 F. 2d 200, 204, said:

> "We do no more than recite a well established rule of law when we say the application of an old process to analogous material of foreseeably similar character is not a sufficient contribution to the science to justify the award of a patent monopoly. It is only the achievement of the inventive faculty, as opposed to the product of the exercise of ordinary professional skill, that entitles the researcher to a patent."

It is submitted that Reading's contribution, merely the selection of a device whose normal use resulted in a method of spray painting, did not amount to invention.

THE CLAIMS OF THE READING PATENT DO NOT PARTICULARLY POINT OUT AND DISTINCTLY CLAIM AN IDENTIFIABLE INVENTION AS REQUIRED BY STATUTE.

It is a fundamental rule of patent law that it is the function of the claims of a patent to particularly point out and distinctly claim the invention covered thereby. The pertinent portion of the statute states (35 U.S.C. 112):

> "The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and

shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.''

In the light of this statute, let us review the invention made by Reading. If Reading invented anything, he invented a process of forming and thereafter spraying an emulsified rubber cement in the recapping of tires. No other utility for the process is described in his patent nor is any other utility therefor alleged.

The record clearly establishes that the Reading process is made up of the following essential features:

1. It is specifically adapted for use in the recapping of tires (Ex. 1, Col. 1, lines 15-17, R. 705).

2. It requires the forming of an ''emulsion'' of air in a cement containing an inflammable solvent, said ''emulsion'' being in the form of a multiplicity of minute air bubbles dispersed in the cement (R. 410). Such an emulsion, according to the patent specification (Ex. 1, Col. 4, lines 5 to 19, R. 706) and the uncontradicted testimony of the witnesses, can only be formed by the use of two stages of pressure in the pressure tank of a spray device; beginning with an initial pressure of 40 pounds per square inch or more followed by the reduction of pressure below the said initial pressure to preferably 10 to 15 pounds per square inch (R. 361-362, 410 and 512). As a result of this two-stage pressure treatment, air dissolved in the cement at the higher pressure is released and forms a

multiplicity of minute air bubbles in the cement at the lower pressure (R. 410).

3. An important feature of the alleged invention is the function of the emulsion in preventing the settling of the solid components of the cement (R. 402-403).

4. Another important feature of the alleged invention is the production of a non-explosive spray through the admixture of the cement-air "emulsion" with a sufficiently large volume of air from an independent stream of air in a mixing zone (R. 294-296).

5. A further important part of the alleged invention is the use of air pressure in the independent stream of air at from 150 to 200 pounds per square inch with a pressure in the tank of 15 pounds per square inch (R. 238, 364).

In analyzing the claims of the Reading patent to determine whether or not these essential elements, limitations and conditions are included therein, it is found that there is a complete absence of a definition of these important features of Reading's invention.

1. The claims fail to define and point out the only use for the invention.

The claims do not in any way mention or limit the invention to the specific art to which it is directed; namely, the recapping of tires. There is no question that the Reading process is designed to solve problems existing only in, and peculiar to, the tire recapping art. The claims are not so limited, instead they are drawn broadly to "A method of applying rubber cement . . . onto a surface."

2. The claims fail to define and point out the method of forming the "emulsion" called for and the volume of air said emulsion is to be mixed with.

If Reading can be attributed with any discovery or invention, it is in the formation of the "emulsion" of air in a cement containing an inflammable solvent. This emulsion must be one wherein there is formed a multiplicity of minute air bubbles in the cement. Such an emulsion can *only* be formed by first charging the cement with an air pressure of at least 40 pounds per square inch and then reducing that pressure below 40 pounds per square inch.

The claims (Ex. 1, R. 707) describe the formation of the emulsion in the following manner:

Claim 1:... "forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure into a substantial body of cement maintained in said zone at superatmospheric pressure . . ."

Claim 2:... "introducing a quantity of air at superatmospheric pressure into the cement under emulsion conditions to form a stable dispersion of gas and cement under pressure . . ."

Claim 3:... "introducing a quantity of air into the cement under conditions to form an emulsion of air in the liquid cement at a pressure in the range of about 5 pounds to about 200 pounds per square inch . . ."

Claim 4:... "introducing a quantity of air into the liquid cement under conditions to form an emulsion of air in the cement at a pressure in the range of about 5 pounds to about 200 pounds per square inch . . ."

Not one of the claims refers to any feature suggestive of the method of forming the emulsion; namely, an initial high pressure and then a reduction of that initial pressure,—a critical element of this invention. This is the only element of the invention that distinguished the claimed process from the process used for many years by Reading in the regular course of his retreading business. Thus, the only novel feature of the Reading patented process is not distinctly claimed or particularly pointed out in the claims in suit.

The specification points out that the emulsion "is an emulsion containing about 10 to 20 per cent air and about 80 to 90 per cent cement by volume of the mixture at the application pressure" (Ex. 1, Col. 4, lines 24 to 27, R. 706). Such an emulsion is not particularly pointed out or distinctly claimed.

As a matter of fact, the claims give no indication of how the emulsion is to be formed, despite the fact that the method of forming the emulsion is one of the critical elements of the invention. Therefore, Reading has failed to define an identifiable invention.

3. The claims do not distinctly point out and distinctly claim the feature of the invention that prevents the settling out of the solid components of the cement.

Reading testified (R. 272) that one of the main objections to the method he employed for many years prior to his patented method, in spraying rubber cement, was that the solids in the cement settled out. There is no reference in any of the claims to this important feature of the invention. However, an examination of the specification discloses that this is allegedly a new function and

an important discovery in the art (Ex. 1, Col. 5, lines 7 to 27, R. 707). This alleged important feature of utilizing the emulsion to prevent settling of solids does not appear in the claims. In order for the function of the emulsion to have any meaning, we must first have a cement which contains solids which may settle out. This problem exists only with such cements and not all rubber cements contain pigments or other materials capable of settling. If a cement with no pigments or other materials capable of settling is used, then the emulsion has no function. It does not appear that any or all air emulsions will have such a function, and it must be presumed that only those emulsions containing a sufficient amount of air properly dispersed will be effective to prevent settling of solids, provided the cement contained solids which tended to settle out. The nature of the cement and the nature of the emulsion are interrelated. However, this interrelationship is not defined in the claims.

4. The production of a non-explosive spray is not particularly pointed out or distinctly claimed.

One of the most important claims made for the Reading invention is that it produces a non-explosive spray even though that spray contains an inflammable solvent. The testimony is uncontradicted that to produce a non-explosive spray with the emulsion employed by Reading certain very definite proportions of cement and air must be employed (R. 446-447). The Reading specification recognizes that there must be a definite ratio between the hydrocarbon solvent contained in the cement and the volume of air mixed with said hydrocarbon where it states:

"With the air and emulsion pressures set as described, about three cubic feet of air is used with about 1/6 ounce of cement. There is no need for the cement coating to dry and the camelback can be applied immediately to the sprayed carcass. Since there is used a very large volume of air and very small amount of cement the ratio of hydrocarbon solvent to air is below the range of explosive mixtures and there is no explosion or fire hazard in the vicinity of the spray gun operator. Also, for the same reason, the concentration of the hydrocarbon vapors produced during the spraying operation is sufficiently low to reduce to a minimum any health hazard to the operator." (Ex. 1, Col. 4, lines 41-53, R. 706)

and

"If a liquid cement, instead of my emulsion, is fed directly to the spray gun with a stream of air under pressure, there is sludging and gumming of the spray gun and an uneven coating of cement results. It frequently becomes necessary to agitate and re-suspend the settled solids in the liquid. In addition, the explosion and health hazards are increased when using the liquid cement instead of my emulsion of gas in liquid cement." (Ex. 1, Col. 5, lines 24-31, R. 707)

This non-explosive spray is definitely an important feature of the alleged invention. However, no mention of the production of such a spray or any conditions which would produce such a spray is found in the claims. As far as the claims are concerned, one who sprays an explosive spray would infringe.

The only example of the type spray to be used that is found in the specification uses 1/6 of an ounce of cement to 3 cubic feet of air. According to the testimony (String-

field R. 446), such a mixture would contain 1.1% of inflammable solvent. The lower limit of the inflammable range is 1.4% of inflammable solvent as admitted by Stringfield (R. 408).

Nevertheless the only claim that in any way attempts to point out any relation between the amount of cement and the amount of air contained in the spray is claim 4, which states:

> ". . . continuously mixing the streams of emulsion and air in a mixing zone to form a spray of emulsion suspended in air containing of the order of a fraction of an ounce of cement to several cubic feet of air . . ." (Ex. 1, Col. 6, lines 36 to 39, R. 707)

Therefore, one who sprayed a mixture of 2/6 or even up to 9/10 of an ounce of cement with 3 cubic feet of air would be spraying an explosive mixture as admitted by the witness Stringfield (R. 446-447). Such a spray would come within the scope of all of the claims and would infringe them even though one of the claims to fame of Reading is that his spray is non-explosive.

A mixture containing from ⅓ of an ounce up to 1 ounce of cement with 3 cubic feet of air would clearly fall into the explosive range (R. 446-447). The record establishes, therefore, that the difference between an explosive and a non-explosive mixture depends upon a number of critical factors. Specific and limited ratios of air and cement are absolutely necessary to produce a non-explosive spray and may be obtained in various ways. Such ratios do not appear in the claims, excepting in claim 4, *which includes both explosive and non-explosive mixtures and, therefore, is meaningless.* It is submitted that each of the claims

fails to particularly point out or distinctly claim this important part of the invention.

5. The pressure of the independent stream of air is not specified in the claims although critical.

The Reading specification recognizes this, stating:

> "The pressure of the compressed air fed to the spray gun 27 is set at about 150 to 200 pounds per square inch * * * ." (Ex. 1, Col. 4, lines 32-34, R. 706)

Reading admitted that a critical factor in his process was the pressure of the independent stream of air, stating (R. 364-365):

> "Q. Now, is it your contention that the bypass pressure that you employ on your independent stream of air is critical in the practice of your process?
>
> A. Yes; in a sense it is critical. It has to be. May I explain that?
>
> Q. Yes; go ahead.
>
> A. It has to be high enough in pressure so that it avoids cobwebbing of your material as it comes out of the gun, and it has to be high enough that it drives the cement deeply into the buffed pores of the tire."

Criticism was leveled at the prior art because no specific pressure was specified for the independent stream of air admittedly included in said prior art (R. 114-115, 427-431). However, the claims in suit fail to mention any specific pressure for the independent stream of air.

As far as the claims of the Reading patent are concerned, the pressure of the independent air stream could be lower than the application pressure in the tank. Under such conditions the process would be inoperative. It is necessary that the pressure of the independent stream of

air be specified in the claims in order that an operative process be defined by the claims. Thus, this important and critical part of the invention is not particularly pointed out nor distinctly claimed.

It is obvious that the Reading claims come within the doctrine of the Supreme Court set forth in the case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 277, 69 S. Ct. 535, 538, and recently followed by this Court in *Winslow Engineering Company v. Smith,* 223 F. 2d 438. The language of the Reading claims is understandable and is free from ambiguity. However, they do not define an invention. If Reading made any contribution to or invention in the art, his claims do not particularly point out or distinctly claim this contribution or invention and as said by this Court in the Winslow decision:

> "We think, however, that Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 277, 69 S. Ct. 535, 538, 93 L. Ed. 672, compels us to hold that these claims are invalid. In that case the district court had held that certain of the claims were too broad and comprehended more than the invention. The court of appeals disagreed holding that the claims should be held to be limited to certain items named in the specifications and said that the district court should have construed the claims: 'as thus narrowed and limited by the specifications.' The Supreme Court said, 336 U.S. at page 277, 69 S. Ct. at page 538: 'The statute makes provision for specification separately from the claims and requires that the latter "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." R.S. § 4888, as amended, 35 U.S.C. § 33, 35 U.S.C.A. § 33. It would accomplish little to require

that claims be separately written if they are not to be separately read. While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to "particularly point out and distinctly claim" an identifiable invention or discovery. We have frequently held that it is the claim which measures the grant to the patentee. * * * While the cases more often have dealt with efforts to resort to specifications to expand claims, it is clear that the latter fail equally to perform their function as a measure of the grant when they overclaim the invention. When they do so to the point of invalidity and are free from ambiguity which might justify resort to the specifications, we agree with the District Court that they are not to be saved because the latter are less inclusive.'

"We are unable to note here any ambiguity in the claims in question. Hence, in this respect, we find ourselves in the position of the Court of Appeals of the Seventh Circuit in Borg-Warner Corp. v. Mall Tool Co., 217 F. 2d 850, 856. There the court, which had been reversed in the Graver Tank & Mfg. Co. case, supra, noting that there was no ambiguity in the claims there in question, said that 'to limit those words * * * by reference to the specifications seems to us to go beyond what we are permitted to do under the Supreme Court's decision in the Graver case.' "

* * * * * * *

"We hold therefore that the appellant's claims are invalid for failure to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery', or, as the new statute puts it, it has failed to conclude with claims 'particularly pointing out and distinctly claim-

ing the subject matter which the applicant regards as his invention.' '' (pages 443-444).

THE DISTRICT COURT ERRED IN NOT HOLDING THE CLAIMS OF THE PATENT IN SUIT AND EACH OF THEM INVALID IN LAW IN THAT SAID CLAIMS DEFINE NOTHING MORE THAN THE FUNCTION OF A MACHINE.

It is a fundamental rule of patent law that a valid patent cannot issue for a process that covers merely the function of a machine or apparatus. *As a matter of fact, the only disclosure of the Reading process in the patent in suit is the description of the operation of the spray apparatus disclosed therein* (Ex. 1, Col. 3, line 68 to Col. 4, line 53, R. 706).

The process claims of the Reading patent in suit merely define the inherent function of the apparatus disclosed in the Reading patent. It is submitted that under the law these claims are invalid because they do not describe a patentable process, but merely describe the function of the Reading apparatus.

The Supreme Court has stated this rule in the landmark case of *Boyden Power-Brake Co. et al. v. Westinghouse et al.,* 18 S. Ct. 707, 716:

> '' 'But the term ''process'' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed; grain, of being ground; iron, of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means,

or the use of a machine, as distinguished from a process.

"'In this use of the term, it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it.'"

* * * * *

"Most of the prior authorities upon this subject are reviewed in the recent case of Locomotive Works v. Medart, 158 U.S. 68, 15 Sup. Ct. 745, in which it was also held that a valid patent could not be obtained for a process which involved nothing more than the operation of a piece of mechanism, or the function of a machine. See, also, to the same effect, Wicke v. Ostrum, 103 U.S. 461, 469. * * *"

In the case of *Demco, Inc. et al. v. Doughnut Mach. Corporation* (C.C.A. 4, 1932), 62 F. 2d 23, 25, the Court said:

"* * * It is elementary that the mere function of a machine is not patentable, and that the claims of a patent must be construed in the light of the specifications and drawings to which they relate, and not given an interpretation so broad as to cover the function of the machine patented and thus protect against every possible machine with like function."

See also:

American Lava Co. et al. v. Steward, et al., 155 F. 731.

The Seventh Circuit Court in the case of *Interstate Folding Box Co. v. Empire Box Corporation,* 68 F. 2d 500, 501, clearly and succinctly stated the rule as follows:

> " ' "A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or in other words, for the function of a machine." Risdon Locomotive Works v. Medart, 158 U. S. 68 at page 77, 15 S. Ct. 745, 748, 39 L. Ed. 899. * * *"

For purposes of illustration, claim 1 (R. 707) of Reading is hereinbelow analyzed to establish that it only defines the function of the apparatus disclosed in said Reading patent:

Claim 1:

"A method of applying rubber cement which includes an inflammable solvent, comprising:

a) "forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure into a substantial body of cement maintained in said zone at super-atmospheric pressures,"

This step is nothing more or less than the inherent function of the tank and air inlet tube of the Reading patent when air under pressure is introduced through the tube and into the tank containing the cement. This element covers the tank and tube of many of the prior art patents, particularly the patents to Shelburne No. 1,710,435, Gradolph No. 1,318,863 and McLean et al. No. 1,395,965.

b) "continuously withdrawing a stream of the emulsion from the dispersion zone,"

This is the inherent function of the tank and the outlet tube of Reading, when the fluid in the tank is put under pressure and said fluid is withdrawn from the tank.

Similarly, Shelburne, Gradolph and McLean et al. inherently function to continuously withdraw a stream of fluid from their respective tanks.

c) "forming an independent stream of air,"

The forming of an independent stream of air is inherent in the operation of the Reading device. So also Shelburne, Gradolph and McLean inherently operate to form an independent stream of air.

d) "continuously mixing the emulsion stream with said independent stream of air in the mixing zone,"

This step is the inherent function of any spray gun. This inherent function is present in Shelburne, Gradolph and McLean.

e) "and continuously directing the resulting mixture of emulsion and air onto a surface to form a thin uniform coating of rubber cement thereon."

Again, this is the inherent function of the spray gun of Reading. It is also the inherent function of the spray guns of Shelburne, Gradolph and McLean.

Each of the claims of the Reading patent similarly describes the inherent function of the Reading apparatus.

As was said in the case of *Ludlow Manufacturing & Sales Co. v. Dolphin Jute Mills, Inc.,* 50 F. Supp. 395, 398, Per Curiam Affirmance, 145 F. 2d 471 (C.C.A. 3):

> "It is our firm conviction that the claims in issue do not define a patentable method but define the peculiar and characteristic functions of the elements

of the apparatus recommended for its practice, and appropriately illustrated and described in the specifications of the patent. There is no suggestion in either the patent or the evidence that the method may be practiced by any other means. It seems reasonably clear from a reading of the patent in its entirety that the essence of the invention, if any, resides not in the method but in the apparatus, and particularly in the elements thereof defined in claim 10, hereinabove quoted. The successive operations of the purported method, as hereinabove stated, are inherent in the elements of the apparatus as the peculiar and characteristic functions thereof. It necessarily follows that the claims in issue are invalid."

* * * * * *

"When the claims in issue are read and construed in the light of the prior art, as they must be, the absence of patentable invention seems to be clearly demonstrated. The successive operations of the purported method are inherent in devices of the prior art, several of which were admittedly in common use and others of which were disclosed by patents of the prior art. It is particularly significant here that these devices, and the elements of which they are comprised, are not only adaptable to the said operations, but the said operations are inherent in them as their normal and intended functions. It follows that the claims in issue, since they define the peculiar and characteristic functions of the apparatus recommended for the practice of the purported method, are anticipated by the devices of the prior art in which these functions are inherent."

Each step in the Reading process is old in the identical art. Reading merely expressed his process claims by the use of different wording, in an attempt to distinguish his

process from the inherent function of his apparatus. This Court considered the identical situation in *Stauffer v. Slenderella Systems of California, Inc.,* 254 F. 2d 127, 130, where it said:

> "* * * The Stauffer device is a collection of elements, old in the identical art, brought together and differentiated semantically from prior devices. It is a mere aggregation. No new function is performed thereby. Not only a skilled mechanic, but the draftsman of ordinary good sense could have combined them to produce the result if he were confronted by wording from prior devices."

ANTICIPATION.

Prior Uses.

The evidence establishes three prior uses. Each of these prior uses meets the test of substantial identity with the Reading process. Said prior uses are those of Cahill and Hartman in the use of the method disclosed in Cahill patent No. 2,758,037 (filed June 17, 1953, Ex. 4, R. 769), and the prior uses of appellee, Ralph R. Reading.

The Patent Office did not consider any of these prior uses during the prosecution of the Reading application. Under such circumstances, the presumption of validity is substantially weakened if not completely destroyed.

In the case of *Lempco Products, Inc. v. Timken-Detroit Axle Co.,* 110 F. 2d 307, 310 (C.A. 6), the Court, in discussing the effect of a prior use not considered by the Patent Office, said:

> "The Autocar prior use was not, however, before the examiner in the Patent Office and no presumption of validity may overcome a pertinent prior art reference not there considered . . ."

Cahill, in January of 1953, developed a method of spray painting rubber cement, and he employed this method in the retreading of tires from the 1st of January 1953 to the 7th of February 1953, when he considered his method had been perfected to such an extent that he could then manufacture and sell spray devices to practice his method of spraying rubber cement on tire carcasses. Mr. Cahill immediately embarked on the manufacture and sale of such devices and sold five spray devices from February 7, 1953 to July 23, 1953[3] (R. 625-628).

During the early period of the development of this method by Cahill he was assisted by a Mr. Hartman, a neighbor of his in Danville, Virginia (R. 625), who operated a tire retreading shop located directly across the street from Cahill's shop (R. 671). Mr. Hartman supplied Mr. Cahill with tires with which to practice his method of spray painting rubber cement (R. 624). In return for this assistance, Mr. Cahill, on February 7, 1953, gave to Mr. Hartman the original machine he had developed. A picture of this machine is in evidence as Ex. 9, R. 835.

Mr. Hartman employed this machine in practicing the Cahill method of spray painting rubber cement in the regular course of his tire retreading business from Feb-

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[3]July 23, 1953 is the critical date with respect to prior public uses because said date is one year prior to the date of the filing of the Reading patent application.

ruary 7, 1953 to July 1, 1953, and between these dates used said method of spray painting rubber cement on some 4,658 tires retreaded in his shop (Ex. 16, R. 844).

The Cahill method of spraying rubber cement included the following: a method of applying rubber cement which comprised an inflammable solvent, wherein the rubber cement and solvent were manually stirred and then placed into a tank, compressed air under superatmospheric pressure was introduced into said tank, the said cement was continuously withdrawn from the tank, an independent stream of air was formed, said independent stream of air and the stream of cement were continuously mixed in a mixing zone and the resulting mixture of rubber cement and air was continuously directed onto a surface to form a thin uniform coating of rubber cement thereon. In addition to the above, brushes were also employed to additionally smooth the sprayed cement in a thin film evenly over the surface of the tire. However, these brushes did not change or modify the spraying of the cement (R. 648).

This is substantially identical to the method set forth in claim 1 of the Reading patent.[4]

Appellee, Ralph R. Reading, testified that in December 1951 he began employing a method of spray painting rub-

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[4]Reading patent claim 1: A method of applying rubber cement which includes an inflammable solvent, comprising forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure into a substantial body of cement maintained in said zone at superatmospheric pressure continuously withdrawing a stream of the emulsion from the dispersion zone, forming an independent stream of air, continuously mixing the emulsion stream with said independent stream of air in a mixing zone, and continuously directing the resulting mixture of emulsion and air onto a surface to form a thin uniform coating of rubber cement thereon.

ber cement on tire carcasses for the identical purpose of the Reading patented process (R. 350), and continuously used this method in the commercial operation of his shop from that date down to September 1953 (R. 352). During this period Reading commercially employed this method on an average of from 300 to 400 tires per month that were retreaded in his shop, and sold these tires in the ordinary and regular course of his business (R. 352).

The Supreme Court, in passing on a prior public use by a patentee under similar circumstances to those of the Reading prior public use above mentioned, held in the case of *Electric Storage Battery Co. v. Shimadzu et al.,* 307 U.S. 5, 20, 59 S. Ct. 675, 684, the following:

> "* * * The ordinary use of a machine or the practise of a process in a factory in the usual course of producing articles for commercial purposes is a public use.
>
> In the present case the evidence is that the petitioner, since June 1921, has continuously employed the alleged infringing machine and process for the production of lead oxide powder used in the manufacture of plates for storage batteries which have been sold in quantity. * * *"

The prior use of appellee, Ralph R. Reading, was substantially identical to that covered by the Reading patent in suit. This prior Reading public use included the following method: applying rubber cement which included an inflammable solvent wherein a mixture of rubber cement and solvent was placed in a tank and manually stirred, compressed air at superatmospheric pressure was introduced into said tank, the said cement was continu-

ously withdrawn from the tank, an independent stream of air was formed, said independent stream of air and the stream of cement were continuously mixed in a mixing zone and the resulting mixture of cement and air was continuously directed onto a surface to form a thin uniform coating of rubber cement thereon.

This method is substantially identical to the claims of the Reading patent (see footnote wherein claim 1 of Reading patent is set forth, page 43 herein).

Actually, the only difference between the processes of the Cahill and Reading prior uses and the Reading patented process is the inclusion of the old and well-known step of passing air under pressure through the fluid contained in the tank of the spray device. The passage of air through fluids in spray devices was very old at the time of the filing of the Reading application[5] so that Reading did not make any new advance in the art of spray painting in his patent.

It is submitted that these prior uses teach a process substantially identical with the Reading patented process. Any mechanic skilled in the art, desiring to agitate and pass air through the cement, would select this old step from the prior art. Such a selection would not amount to invention. As a matter of fact, Cahill tested this in January 1953 (R. 649).

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[5]The Court is referred to the prior art patents of Shelburne (Ex. 4, R. 765); Gradolph (Ex. 4, R. 753); Barton (Ex. 5, R. 780); Paasche (Ex. 5, R. 785); Seweryn (Ex. 5, R. 791); McLean et al. (Ex. 4, R. 759); Kline (Ex. 5, R. 795); Davis (Ex. 5, R. 818); and McIntosh (Ex. 5, R. 821); all pleaded as prior art and each of which discloses passage of air through fluid in the tank of a spray device. These patents are more fully discussed in this brief in the next section thereof entitled "Prior Patents".

The cement in the tank of either of the prior uses of Reading, Cahill or Hartman, when put under superatmospheric pressure, would absorb air so the cement sprayed in these processes would have air entrained therein (R. 354 and 451), and in that respect said cement would be similar to that called for in the Reading claims.

Prior Patents.

The Patent Office did not consider the most pertinent prior art patents during the prosecution of the Reading application.

The presumption of prima facie validity of a patent is destroyed where the most pertinent prior art was not cited or considered by the Patent Office during the prosecution of the application which results in the patent. This rule is well settled.

The Court of Appeals for the Ninth Circuit in *Gomez v. Granat,* 177 F. 2d 266, 268, stated the rule as follows:

> "None of these prior patents were cited or considered by the patent office during the prosecution of the patent application for the Granat patent. In this situation it is argued that the presumption of prima facie validity is greatly weakened if not destroyed when pertinent prior art is not cited or considered by the patent office, and this court has so held. Stoody v. Mills Alloys, 9 Cir., 67 F. 2d 807; Mettler v. Peabody Engineering Corp., 9 Cir., 77 F. 2d 56; McClintock v. Gleason, 9 Cir., 94 F. 2d 115."

See also:

Jacuzzi Bros., Inc. v. Berkeley Pump Co., 9 Cir., 191 F. 2d 632.

Syracuse v. Paris, 9 Cir., 234 F. 2d 65.

The District Court ruled that the method resulting from the use of the Elrick spray device was substantially identical to the method covered by the claims of the Reading patent, and that said Elrick method was an infringement of the claims of said patent. It is submitted that, under such circumstances, the normal methods of operation of mechanical spray devices disclosed in the prior art can rightfully be used as methods that are anticipations of the said Reading claims.

This rule is succinctly stated in the case of *MacDougald Const. Co. v. Finley,* 38 F. 2d 809, 810 (C.C.A. 5), where the Court said:

> "* * * In fact, a patent for a process is anticipated by a machine capable of performing the process and used successfully to that end.
>
> " 'It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.' Roberts v. Ryer, 91 U.S. 150, 157, 23 L. Ed. 267."

It is interesting to note that the only description of the Reading process that can be found in the Reading patent is a description of the normal method of operation of the Reading apparatus (Ex. 1, Col. 3, line 68 to Col. 4, line 53, R. 706).

Shelburne Patent No. 1,710,435.

In Fig. 3, and in the specification of the Shelburne patent (Ex. 4, R. 765), there is disclosed a paint spraying device that is identical in construction, mode of operation and result to that of the Elrick device and method

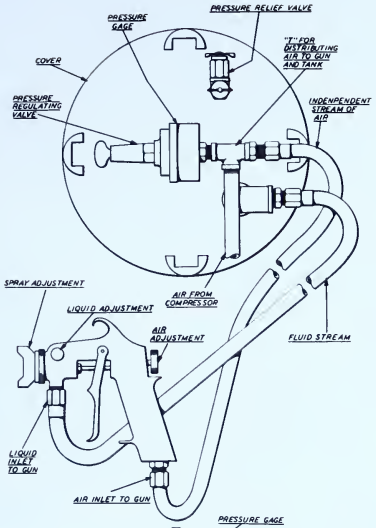
here held to be an infringement of the patent in suit. Naturally, when the Shelburne spray device is employed in spraying a fluid, there comes into being a method of spraying a fluid in the same manner as a method comes into being from the operation of the apparatus disclosed in the Reading patent or in the use of the Elrick device. An examination of the Elrick device and the device disclosed in the Shelburne patent Fig. 3 establishes that these two devices are identical in construction, and in the method that results from the operation of these two devices. To establish substantial identity of the method resulting from the use of the Shelburne device, there is set forth below the method that would result from normal operation of the Shelburne device (Fig. 3):

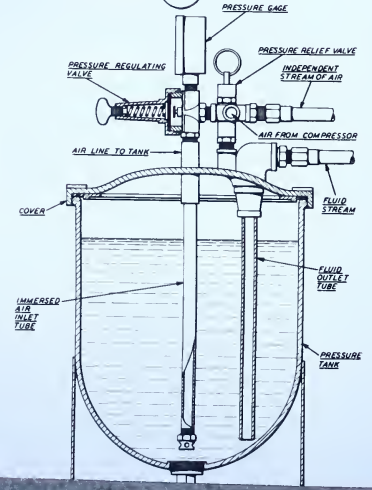
Rubber cement and solvent are placed in the tank 8. Air under pressure is passed through the air inlet tube 26 and into the tank 8; said air under pressure also passes through and agitates the fluid in the tank and by the passage of air through said fluid an emulsion (as contended for by Reading) of air and fluid is formed. The fluid in the tank is continuously withdrawn from the tank through the outlet tube 9a. An independent stream of air is formed and passes through the T 19a and hose 21 to the spray gun 14. The stream of fluid continuously withdrawn from the tank and the independent stream of air is continuously mixed in the spray gun 14 which provides a mixing zone. The resulting mixture of fluid and air that passes through the spray gun is directed onto a surface to form a thin coating.

The process steps above stated inherently result from the normal operation of the Shelburne device. This proc-

THE METHODS INHERENTLY RESULTING FROM THE OPERATION OF THE ELRICK DEVICE AND THE DEVICE DISCLOSED IN THE SHELBURNE PATENT NO. 1,710,435 (Ex. 4, R. 365) ARE IDENTICAL

ELRICK





The process resulting from the operation of the Elrick and Shelburne devices is as follows:

1. Fluid is placed into the pressure tank;

2. Air under pressure is passed through the fluid by introducing said air under pressure into the body of the cement in the tank through the immersed air inlet tube and out of the pressure relief valve, thus agitating said fluid (Reading contends this forms an emulsion in the Elrick process. Therefore, by the same reasoning, Shelburne, who teaches agitation by identical means (Ex. 4, R. 767, lines 25-39), would also form an emulsion);

3. Fluid is continuously withdrawn from the pressure tank through the fluid outlet tube;

4. An independent stream of air is formed;

5. The fluid stream and said independent stream of air are continuously mixed in a mixing zone at the outlet of the spray gun;

6. The mixture of fluid and air is continuously directed onto a surface to form a thin coating of fluid thereon.

If the operation of the Reading device results in a process then the above process steps inherently result from the normal operation of the Elrick and Shelburne devices. Therefore, if the Elrick process infringes Reading, so would Shelburne, and the maxim "That which infringes if later anticipates if earlier" must be applied.

SHELBURNE

Fig. 1.

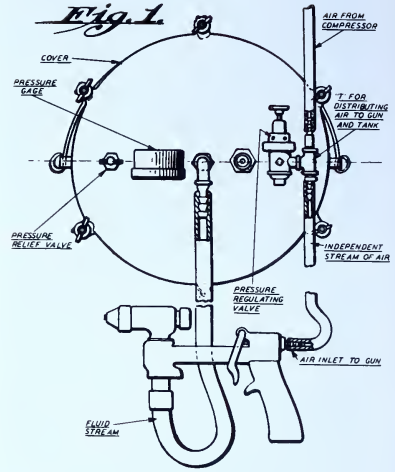
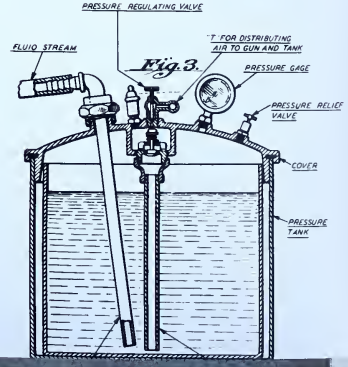


Fig. 3.



ess is identical in all respects to the process resulting from the normal operation of the Elrick device.

There is set forth on the chart opposite this page detail drawings of the Elrick device and of the device shown on Fig. 3 of the said Shelburne patent. The chart also sets forth the process steps resulting from the normal operation of said two devices.

It is therefore submitted that the Shelburne patent not having been considered by the Patent Office during the prosecution of the Reading patent completely destroys any presumption of validity attaching to the Reading patent and is, as a matter of fact, a complete anticipation of Reading.

Gradolph Patent No. 1,318,863.

The same situation as exists with Gradolph is found in the Shelburne patent. The Gradolph patent (Ex. 4, R. 753) discloses a device for spray painting and the normal operation of the Gradolph device by one skilled in the art results in a method of spray painting that is completely anticipatory of the Reading patent in suit, and is identical with the method resulting from the use of the Shelburne, Reading or Elrick devices.

Gradolph teaches the introduction of fluid into the pressure tank 1. An air inlet pipe 42 is provided which serves to introduce air under pressure into the tank into the fluid adjacent the bottom of the tank through a number of openings 43. A portion of the high pressure air is diverted directly to the spray gun. The fluid in the tank, which has been agitated by passage of air therethrough, is forced by pressure out of the tank to the spray gun,

where it is mixed in a mixing zone with the independent stream of air, and this resulting mixture is sprayed onto a surface exactly the same as in Elrick.

McLean et al. No. 1,395,965.

Again, the McLean et al. patent (Ex. 4, R. 759) discloses an apparatus that when operated in its normal way, results in a method of spray painting. This method is as follows:

Fluid is introduced into the pressure tank 1. An air inlet tube 15 permits air under a high pressure to be fed into the tank adjacent the bottom of said tank so that the fluid is agitated and charged when put under pressure. McLean et al. also divides said high pressure air so that a portion goes into the tank and a portion directly to the spray gun. The charged fluid under pressure is forced out of the tank to the spray gun where it is mixed with the independent stream of air and sprayed onto a surface.

The above described methods inherently resulting from the normal operation of the devices disclosed in the patents to Shelburne, Gradolph and McLean et al. are identical to the method that results from the operation of the Elrick device that was held by the District Court to be an infringement of the claims of Reading. Therefore, if the method resulting from the operation of the Elrick device is an infringement of the Reading claims, then the method inherently resulting from the operation of the Shelburne, Gradolph and McLean et al. devices would also be an infringement. Being earlier in time than Reading, they are therefore anticipations of the Reading patent.

Cahill Patent No. 2,758,037.

The method disclosed and claimed in the Cahill patent (Ex. 4, R. 769) is the method that was discussed under the subdivision entitled "Prior Uses". Cahill not only discloses the apparatus of a spray device but discloses the method resulting from the operation of said spray device, and specifically describes the method of use of said device. Cahill also claims as a method the use of the Cahill device. The Court is referred to the method resulting from the use of the Cahill device set forth on page 43 of this brief.

It is submitted that with the knowledge of spray painting rubber cement disclosed in either the prior Cahill and Hartman uses and the Cahill patent, one skilled in the art, who desired to spray rubber cement, would, by a mere matter of selection, employ the devices of either Shelburne, Gradolph or McLean et al. in practicing a method of spray painting rubber cement that was identical to the method of Elrick and, therefore, under the well known rule "That which infringes if later anticipates if earlier", would be following an old process and could not be considered as infringing the Reading patent in suit.

All that Reading did was to spray paint rubber cement, an old thing by the Cahill patent and the Cahill, Hartman and Reading prior uses, using the old process inherently resulting from the use of the devices disclosed in the patents to Shelburne, Gradolph and McLean et al.

The Supreme Court in the early case of *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.,* 4 S. Ct. 220, 222, in following this rule, said:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. * * *"

See also:

Pierce v. Muehleisen, 226 F. 2d 200 (C.A. 9).

In the recent case of *Ralph F. Stallman v. Casey Bearing Company, Inc.,* 144 F. Supp. 927, 929, (U.S.D.C. N.D. California, S.D. 1956) which was affirmed by this Court at 244 F. 2d 905, wherein this Court agreed with the District Court in its conclusion both as to the law applicable to the evidence and the legal conclusion reached with reference to the application of the prior art, the District Court said:

"It is apparent that the extent of plaintiff's contribution to the art was to point out that old devices had a theretofore unperceived advantage which would be realized in *some* old and common applications, but *not* in others. In the words of the Supreme Court in General Electric Co. v. Jewel Incandescent Lamp Co., 1945, 326 U.S. 242, 249, 66 S. Ct. 81, 84, 90 L. Ed. 43, 'that did not advance the frontiers of science in this narrow field so as to satisfy the exacting standards of our patent system. Where there has been use of an article or where the method of its manufacture is known, more than a new advantage of the product must be discovered in order to claim invention.' This is so even though the recognition of the new advantage may benefit industry and bring new commercial success to the product.

> "Thus, solely from the comparison of the prior art with the teaching of plaintiff's patent, without weighing the testimony of any witnesses, expert or otherwise, the only reasonable conclusion that can be drawn is that the patent is invalid. * * *" (Emphasis Court's)

It is submitted that the prior art above analyzed, none of which was before the Patent Office during the prosecution of the Reading application, completely anticipates the said Reading patent.

If the claims of the patent in suit are construed to include appellant's process, then by the same token, they include the prior art and these claims fall under the rule uniformly followed of "That which would infringe if later would anticipate if earlier."

Peters v. Active Mfg. Co., 129 U.S. 530, 537.
Knapp v. Morss, 150 U.S. 221, 228.
Miller v. Eagle Mfg. Co., 151 U.S. 186, 200.

READING DID NOTHING MORE THAN EXERCISE MECHANICAL SKILL IN SELECTING AN OLD DEVICE AS A MEANS TO PRACTICE HIS PROCESS.

It is admitted (R. 364) that the only difference between the early process of spraying cement employed by Reading in his retreading shop from December 1951 to October 1953 and the claimed process of the Reading patent[6] was in "forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure

---

[6]In his testimony (R. 364) Reading mentions *increased* bypass air and changed material and air tips—these things are not claimed.

into a substantial body of cement maintained in said zone at superatmospheric pressure'' (Ex. 1, Claim 1, R. 707). This was accomplished merely by adding to the old paint spray pot of the early Reading prior use an air inlet tube that terminated adjacent the bottom of the pot. In other words, Reading added to his old process a step that was old in the art.

Reading did not invent the process resulting from the operation of this device. The process resulting from the use of such a spray pot is inherent in the operation of the Reading device and is the precise process resulting from the normal operation of the device disclosed in either the Shelburne, Gradolph or McLean et al. patents. The function of introducing air under pressure into a body of the fluid in the tank is inherent in the operation of the devices of these three prior patents.

Any mechanic who desired to introduce air under pressure into fluid in a spray pot would employ this old step, —a step that was first disclosed in the patent to Barton No. 696,158 of 1902. That this is a step well known is evidenced by the fact that in addition to the patent to Barton, the prior patents to Paasche (1914, Ex. 5, R. 785), Seweryn (1918, Ex. 5, R. 795), Gradolph (1919, Ex. 4, R. 753), McLean et al. (1921, Ex. 4, R. 759), Kline (1924, Ex. 5, R. 795), Shelburne (1929, Ex. 4, R. 765), Davis (1933, Ex. 4, R. 818) and McIntosh (1935, Ex. 5, R. 821) all disclose the introduction of air under pressure into the body of the fluid in a spray pot. Whether these patents perform this step for the purpose of forming an emulsion or to agitate is immaterial because, for the purposes of this suit, Reading contends and the District Court

agreed, in its Findings of Fact (Finding VIII, R. 59), that mere agitation forms the emulsion called for in the Reading claims.

In view of the teachings of the art, it required only mechanical skill to develop the patented process and therefore there is no invention. This Court, in the case of *Fowler v. Vimcar Sales Company,* 216 F. 2d 263, 265-266, under similar circumstances, held:

> "The difference disclosed and claimed by appellant Fowler in Patent No. 2,516,196 over the prior art is so trivial and insignificant that it may be said to be the work of a skilled mechanic and not worthy of being classed as an invention. We feel the following is applicable here.
>
> 'The new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.' Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 62 S. Ct. 37, 41, 86 L. Ed. 58.
>
> 'An improvement to an apparatus or method, to be patentable, must be the result of invention, and not the mere exercise of the skill of the calling or an advance plainly indicated by the prior art.' Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U.S. 477-487, 55 S. Ct. 455, 458, 79 L. Ed. 1005.
>
> A number of prior art users manufactured, sold and used adjustable jamb type garage door hardware which was the same or substantially the same as the hardware of the patent at a prior date to any alleged invention of the patent in suit, and these prior art users were apparently not considered by the Patent

Office when the patent in suit was issued. Had there been any such consideration it is quite obvious from the evidence submitted to the trial Court that the patent would not have issued."

See also:

Gomez et al. v. Granat Bros. et al., 177 F. 2d 266, 268, 269.

Pierce v. Muehleisen, 226 F. 2d 200, 204 (C.A. 9, 1955).

Jacuzzi Bros., Inc. v. Berkeley Pump Co., et al., 191 F. 2d 632, 636, 637 (1951).

Aro Equipment Corporation v. Herring-Wissler Co., (C.A. 9, 1936), 84 F. 2d 619, 622.

Ray, et al. v. Bunting Iron Works, 4 F. 2d 214, (C.A. 9, 1925).

Bailey v. Sears, Roebuck & Co., 115 F. 2d 904, 907 (C.A. 9, 1940).

Reading made only minor changes in adapting the old methods inherently resulting from the use of the prior art devices of Shelburne (Ex. 4, R. 765), Gradolph (Ex. 4, R. 753) and McLean et al. (Ex. 4, R. 759). These prior spray methods were common to many fields and, as was said in *Delco Chemicals, Inc. v. Cee-Bee Chemical Co., Inc.,* 157 F. Supp. 583, 590:

"Where, as here, use of a cleaning process or method is common to many fields, 'its application to a new field ordinarily involves no more than ordinary mechanical skill.' Welsh Mfg. Co. v. Sunware Products Co., supra, 236 F. 2d at page 226; Concrete Appliances Co. v. Gomery, 1925, 269 U.S. 177, 185, 46 S. Ct. 42, 70 L. Ed. 222; Vandenburgh v. Truscon Steel Co., 1923, 261 U.S. 6, 15, 43 S. Ct. 331, 67 L.

Ed. 507; Lovell Mfg. Co. v. Cary, 1893, 147 U.S. 623, 633-634, 13 S. Ct. 472, 37 L. Ed. 307.

"Nor is invention ordinarily involved 'even though changes or modifications are essential to the practical application of the method * * * to the new use * * *.' International Steel Wool Corp. v. Williams Co., supra, 137 F. 2d at page 346; cf. Reviser's note to 35 U.S.C. § 101 (1952); Jungersen v. Ostby & Barton Co., 1949, 335 U.S. 560, 69 S. Ct. 269, 93 L. Ed. 235; Mandel Bros., Inc., v. Wallace, 1948, 335 U.S. 291, 69 S. Ct. 73, 93 L. Ed. 12; Sinclair & Carroll Co., v. Interchemical Corp., 1945, 325 U.S. 327, 65 S. Ct. 1143, 89 L. Ed. 1644; Honolulu Oil Corp. v. Halliburton, 1939, 306 U.S. 550, 59 S. Ct. 662, 83 L. Ed. 980."

NON-INFRINGEMENT.

a) Elrick Rim Company does not infringe the patent in suit because Elrick Rim Company neither forms nor sprays an emulsion of air in rubber cement, nor forms or sprays a rubber cement saturated with air as called for by the claims of the patent in suit.

The Reading patent teaches and claims the spraying of an emulsion of rubber cement.

For example, the claims (R. 707) of the Reading patent call for the following:

Claim 1: ". . . forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure into a substantial body of cement . . ." (Ex. 1, col. 5, lines 43-45, R. 707.)

Claim 2: ". . . introducing a quantity of air at superatmospheric pressure into the cement under emulsion conditions to form a stable dis-

persion of gas and cement under pressure, . . .'' (Ex. 1, col. 5, line 56 to col. 6, line 1, R. 707.)

Claim 3: ''. . . introducing a quantity of air into the cement under conditions to form an emulsion of air in the liquid cement . . .'' (Ex. 1, col. 6, lines 13-15, R. 707.)

Claim 4: ''. . . introducing a quantity of air into the liquid cement under conditions to form an emulsion of air in the cement . . .'' (Ex. 1, col. 6, lines 29-31, R. 707.)

Mr. Stringfield, the expert witness for appellees, admitted on cross-examination that the Elrick process does not form an emulsion (R. 438). The expert witnesses for appellant, Mr. Wolk and Dr. Petersen, also so testified at R. 96-97 and R. 511, respectively.

It was finally resolved that an ''emulsion'', as that word is usually defined, was not formed as a result of the Reading process (R. 438) but rather in following the teachings of Reading in the use of an initial pressure of 40 pounds per square inch and then reducing that pressure to an application pressure of from 10 to 15 pounds per square inch, the rubber cement became supersaturated with minute air bubbles (R. 410-412 and 512).

In other words, to come within the teachings of the Reading patent and its claims, there must be formed and sprayed a rubber cement that is supersaturated with minute air bubbles. Elrick Rim Company does not form and spray a rubber cement of this character and therefore does not infringe. Mr. Stringfield testified on direct examination that the Reading process results in super-

saturation of the cement with minute air bubbles, stating (R. 410):

> "* * * And what Mr. Reading accomplishes when he pressurizes it to 30 or 40 pounds is to immediately greatly increase the solubility, the amount of air that has been dissolved in the cement. Then he releases the pressure to 15 pounds. He immediately has a supersaturated solution, which tends to release air in the form of minute bubbles all through the liquid, but which, as is common with supersaturated solutions, does not come back to equilibrium immediately. * * *" (R. 410.)

On cross-examination, Mr. Stringfield was forced to admit that the Elrick process does not form a cement that is supersaturated with air bubbles. His testimony in this regard is as follows (R. 444-445):

> "Q. So, as I understand your answer now, there would be no supersaturation in the Elrick tank?
>
> A. Presumably in the tank itself there might not be supersaturation.
>
> Q. There would not be supersaturation, that is the fact, isn't it?
>
> A. Yes, I think you are right there."

Dr. Petersen corroborated Mr. Stringfield's testimony on both of these points, testifying as follows (R. 512-513):

> "Q. Now, in the tests, and in the preparation of the Reading device for these tests, would the cement be supersaturated with air as a result of the action of that device that was used in those tests?
>
> A. Well, yes. The air is introduced at 40 pounds per square inch, so that the amount of air that would go into solution would approach the solubility of air

in a cement mixture at 40 pounds per square inch. When the pressure is reduced back to 10 pounds per square inch, the amount of air in solution is greater than the solubility at 10 pounds per square inch, so that it would be released in the form of fine bubbles throughout the cement, similar to a bottle of soda water where carbon dioxide would be spontaneously formed in all parts of the liquid."

* * * * * * *

"Q. And would the cement in this Elrick device, as you have described it, be supersaturated with air?

A. Well, the device is operated holding the pressure at 10 pounds per square inch or less, as was testified to yesterday by Mr. Stringfield. There may be some pressure drop through the unit so that the pressure would be at a maximum of 10 pounds per square inch, so that the amount of gas or air in this case that would go into solution would approach the solubility of air at 10 pounds per square inch, and could not exceed that. Since the device is never to be brought over 10 pounds per square inch, it could never be supersaturated with respect to 10 pounds per square inch."

In view of this uncontradicted testimony that Reading's process results in the formation of a cement that is supersaturated with minute air bubbles and that the Elrick process does not form cement that is supersaturated with air bubbles, Elrick Rim Company cannot infringe the claims of the Reading patent.

The Reading patent is in a crowded art, the art of spray painting, and therefore must be narrowly construed. This fundamental rule of patent law was recently reaffirmed by this Court in the case of *Kwikset Locks, Inc. v. Hillgren,* 210 F. 483, 490, where this Court said:

> "The Kwikset knob patent is in a crowded field; therefore, its scope must be narrowly limited. * * *"

As noted above, each of the claims of the Reading patent calls for the formation of an emulsion. The claims do not define the steps to be employed in the formation of said emulsion. Therefore, the specification must be referred to for this purpose. The only teaching of the Reading patent on the formation of his emulsion is as follows:

> "* * * Compressed air at an initial pressure of about 40 pounds per square inch gage, as controlled by reducing valve 25, is dispersed in the liquid cement through pin holes 21. After several seconds the pressure vessel 10 is filled with an air in cement emulsion under a pressure of about 40 pounds per square inch gage. By adjustment of reducing valve 25, the pressure in vessel 10 is then reduced to about 15 pounds per square inch gage for normal application purposes. The initial pressure can, however, be higher than 40 pounds per square inch, and may be as high as say 200 pounds per square inch gage, or higher . . ." (Ex. 1, col. 4, lines 8-19, R. 706.)

Following these process steps, a cement that is supersaturated with minute air bubbles is formed. It is interesting to note that Reading recognizes that a higher initial pressure than 40 pounds can be employed. However, he fails to teach that a lower pressure than 40 pounds can be employed in the preparation of his emulsion.

The Elrick process of preparing cement does not follow the process steps called for by Reading and is in no way similar to Reading.

Elrick Rim Company instructs the users of its apparatus as follows:

> "Adjust air pressure regulator to 10# as shown on air gauge. Do not use over 10# as spray gun has been adjusted for this pressure.
>
> Mix cement thoroughly by air agitation. This is done by opening air release valve located at rear of cover (not the safety valve). Allow air to pass through tank for about 3 minutes for complete mixing. If sprayer is not used for several hours, agitate before using." (Ex. 8, R. 833.)

It is obvious that these steps of the Elrick process are not the same as the steps required to practice the Reading process as disclosed in the Reading patent. More important, the steps of the Elrick process are not the equivalent of the steps of the Reading process because, as admitted by the witness Stringfield and corroborated by the witness Petersen, the steps of the Elrick process do not result in the formation of the rubber cement saturated with minute air bubbles (R. 410, 444, 445 and 512). Stringfield also admitted on cross-examination that the steps of the Elrick process do not form an emulsion (R. 438).

It is submitted that the record establishes, without any question, that the Elrick process does not form either an emulsion or a rubber cement supersaturated with minute air bubbles. Therefore, it cannot infringe the claims of the patent in suit.

b) The claims of the Reading patent call for an "emulsion" and the specification must be examined to determine the proper meaning of this term.

Each of the claims of the patent in suit calls for the formation of an emulsion. What is an emulsion?

Webster's New International Dictionary, Second Edition, defines the word "emulsion" as: "a dispersion of fine particles or globules of a liquid in a liquid".

The witness Petersen defined an emulsion at R. 514 as:

> "* * * the dispersion of a liquid within another liquid."

The District Court introduced into the record (R. 152) the following definition of an emulsion from Chambers Chemical Dictionary:

> "A colloidal suspension of one liquid in another; e. g., milk."

The emulsion called for in the claims does not come within the ordinary meaning or definition of the word "emulsion" as above set forth. Therefore, for an explanation of the word "emulsion" as used in the claims and an illustration of the Reading invention, one must refer to the Reading specification. Where a word employed in a claim is not used in its ordinary meaning, the specification must be examined to determine the proper meaning of that word.

In *Kugelman v. Sketchley,* 133 F. 2d 426, 427, this Court, in stating the rule, said:

> "To ascertain the meaning of terms used in the claims, we look to the specification. Motoshaver, Inc., v. Schick Dry Shaver, 9 Cir., 112 F. 2d 701, 702;

L. McBrine Co. v. Silverman, 9 Cir., 121 F. 2d 181, 182. * * *"

This Court has universally followed the rule that the claims of a patent must be read in light of the specification. A clear statement of the rule by this Court is found in the case of *Lanyon v. M. H. Detrick Co.,* 85 F. 2d 875, 877, where the Court said:

"* * * The specification may be referred to, to limit the claims, and to explain and illustrate them, but they cannot be enlarged by the specification. * * *"

Also, in *Schnitzer et al. v. California Corrugated Culvert Co. et al.,* 140 F. 2d 275, 276, this Court said:

"The claim is to be read in connection with the specifications. Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 432, 22 S. Ct. 698, 46 L. Ed. 968; American Fruit Growers v. Brogdex Co., 283 U.S. 1, 51 S. Ct. 328, 75 L. Ed. 801; Schriber-Schroth Co. v. Cleveland Trust Co., 311 U.S. 211, 312 U.S. 654, 61 S. Ct. 235, 85 L. Ed. 132; Payne Furnace & Supply Co. v. Williams-Wallace Co., 9 Cir., 117 F. 2d 823; L. McBrine Co. v. Silverman, 9 Cir., 121 F. 2d 181; Corcoran v. Riness, 9 Cir., 128 F. 2d 870. Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. McClain v. Ortmayer, 141 U.S. 419, 12 S. Ct. 76, 35 L. Ed. 800; Magnavox Co. v. Hart & Reno, 9 Cir., 73 F. 2d 433; Lanyon v. M. H. Detrick Co., 9 Cir., 85 F. 2d 875. * * *"

There is no question but that the claims of Reading use broader language than the specification. Therefore, under the above quoted rule, the specification must be referred to for the purpose of limiting the claims.

Again, this Court in a similar situation presented in the case of *McRoskey v. Braun Mattress Co.*, 107 F. 2d 143, 146, said:

> "Whether the mattress depressing members of the frames described in the claims are conical-shaped or not, the claims do not state, but, since conical-shaped mattress depressing members are the only ones mentioned in the specification, it must be assumed that the mattress depressing members of the frames described in the claims are likewise conical-shaped. For the claims must be read in the light of the specification. Henry v. Los Angeles, 9 Cir., 255 F. 769, 780."

As in the *McRoskey* case, where the claims did not state whether or not the mattress depressing members of the frame described in the claims were conical-shaped, Reading in his claims does not tell the character of his emulsion. As in the *McRoskey* case, it must be assumed that the emulsion called for in said Reading claims is the emulsion described in the Reading specification; namely, an emulsion formed with "an initial pressure of about 40 pounds per square inch gage" and after several seconds "By adjustment of reducing valve 25, the pressure in the vessel 10 is then reduced to about 15 pounds per square inch gage for normal application purposes."

When the Reading claims are limited to the invention described in his specification, and they must be because the claims use broader language than the specification, then appellant does not infringe. Appellant does not employ an initial pressure of 40 pounds and then reduce said initial pressure to 15 pounds, as called for in the Reading specification. On the contrary, as admitted by Mr. Stringfield, Elrick Rim Company agitates at a pres-

sure of less than 10 pounds and never employs a pressure over 10 pounds (R. 435-436).

Even if the Reading patent is given the broadest interpretation possible with respect to the so-called emulsion and consider his emulsion merely supersaturation of air in the cement and solvent, no such condition exists in the Elrick process (R. 444-445, 512).

Thus, it is seen that the method resulting from the use of appellant's device does not follow the method covered by the claims of the patent in suit as limited by the specification, and therefore appellant does not infringe said claims.

THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES TO APPELLEES.

It is submitted that the District Court was completely in error when it entered an order awarding the sum of $7,500.00 as attorneys' fees to the appellees herein. This suit was one brought under the Declaratory Judgments Act and resulted from the appellees notifying appellant that it infringed the Reading Patent No. 2,721,148 (Ex. P, R. 863). In addition to notifying the appellant directly, appellee, Reading Tire Machinery Co., Inc., notified a substantial number of appellant's customers (R. 243), as well as publishing a notice in the T.B.A. News, a widely distributed trade magazine (R. 231).

The purpose of the Declaratory Judgments Act, as applied in patent law, is to permit one charged with infringement of a patent to immediately bring a Declaratory Judgments Action to determine whether or not the charge of infringement is good and whether or not the

patent is valid. In addition, it is to stop acts of unfair competition in the destruction of a person's business by the wholesale notification of customers of patent infringement, thus intimidating such customers and destroying usual business relations between parties.

After receipt of this notice of infringement (Ex. P, R. 863), appellant attempted to amicably settle this controversy without success (Ex. Q, R. 865 and Ex. V, R. 867). Thereafter appellant, in an attempt to protect its business, followed the course prescribed by the Declaratory Judgments Act and brought suit for an early determination of whether the Reading patent was valid and infringed by it and to stop the wholesale notification of its customers of infringement of the Reading patent. There was nothing malicious or vexatious in appellant's conduct.

On February 23, 1956, the date the complaint herein was filed, due to overt acts of appellees in notifying appellant and appellant's customers of infringement, a justiciable controversy existed between appellant and appellees respecting validity and infringement of the Reading patent. Appellant could not compel appellees to file suit and appellees, unless enjoined, could go on indefinitely charging infringement and threatening customers of appellant.

This Court recognized the necessity of permitting one to file suit under such circumstances where, in the case of *Beacon Theatres v. Westover,* 252 F. 2d 864, 873, it said:

> "* * * We think that the question whether the plaintiff stated a claim properly triable before the court

> sitting in equity must be judged as of the time when the complaint was filed. At that time, October 31, 1956, the defendant had brought no suit; all that plaintiff was confronted with at that time were the threats and duress directed to it and to the distributors. The counterclaim was not filed until February 18, 1957. Obviously prior to the time when it filed its complaint plaintiff was not in a position to compel the bringing of an action by the defendant at any stated time. Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; and as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited. * * *''

In the above decision, this Court recognizes that where rights of a party are being interfered with, that party's only remedy is to present the claim to a court of equity for determination rather than permitting acts to go on indefinitely that would destroy said party's business.

It cannot be said that appellant brought this suit in bad faith or unfairly. Appellant filed suit only after notice of infringement to itself and its customers. This Court recognized that the element of bad faith or unfairness is necessary to an award of attorneys' fees where, in the case of *Park-In Theatres v. Perkins,* 190 F. 2d 137, 142, it said:

> ''* * * 'The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.' Act of August 1, 1946, 60 Stat. 778, 35 U.S.C.A. § 70. But in granting this power, Congress made plain its intention that such fees be allowed only in extraor-

dinary circumstances. The Reports of House and Senate Committees recommending this enactment provided in identical terms that 'It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, * * *. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.' 1946 U.S. Code Congressional Service 1386, 1387. Thus, the payment of attorney's fees for the victor is not to be regarded as a penalty for failure to win a patent infringement suit. The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear. The cases support this view. Phillips Petroleum Co. v. Esso Standard Oil Co., D.C.D. Md. 1950, 91 F. Supp. 215, affirmed 4 Cir., 1950, 185 F. 2d 672; Associated Plastics Co. v. Gits Molding Corp., 7 Cir., 1950, 182 F. 2d 1000; Union Nat. Bk. of Youngstown, Ohio v. Superior Steel Corp., D.C.W.D. Pa. 1949, 9 F.R.D. 117; Hall v. Keller, D.C.W.D. La. 1949, 81 F. Supp. 835, modified (on other grounds) 5 Cir., 1950, 180 F. 2d 753, certiorari denied 1950, 340 U.S. 818, 71 S. Ct. 48; Lincoln Electric Co. v. Linde Air Products Co., D.C.N.D. Ohio 1947, 74 F. Supp. 293, affirmed 6 Cir., 1948, 171 F. 2d 223."

Appellant did not infringe the patent in suit in bad faith. It merely took an old and well-known paint spray pot and manufactured and sold said old paint spray pot to spray rubber cement and solvent. This was done at a

time when the spray painting of rubber cement was old because of Cahill's prior use.

The only actual basis for the award of attorneys' fees is the statement found in the District Court's Memorandum Decision where the Court said (R. 32):

> "As the Plaintiff forced the litigation upon the Defendant and sought not only declaration of invalidity and damages for unfair competition, but attorneys' fees also, under circumstances which the Court thinks were not justified, in view of the recency of the issuance of the Defendant's patent, the Court is of the view that in this case the Defendant should recover attorneys' fees against the Plaintiff. The amount will be determined upon a showing to be made before this Court on notice to be given by the Defendants."

This statement by the Court is completely in error. The appellant did not force this litigation on appellees but rather appellees took the initiative and notified appellant of infringement, thereby raising a justiciable controversy between the parties, and thus forcing appellant into the position of having to bring suit under the Declaratory Judgments Act to resolve this controversy. Under such circumstances, there is no justification whatsoever for awarding appellees attorneys' fees.

This Court has often ruled that attorneys' fees are to be awarded only in exceptional circumstances, where the action of one party is completely malicious, vexatious and improper.

THE FINDINGS OF FACT ENTERED HEREIN BY THE DISTRICT COURT ARE CLEARLY ERRONEOUS.

It is submitted that the findings made and entered by the District Court are clearly erroneous. The prior sections of this brief, wherein the character of the Reading invention and the state of the prior art are discussed, establish that the District Court's finding with respect to validity of the Reading patent is clearly erroneous. We refer the Court to the prior sections of this brief which we believe establish the following:

1. The Reading invention did not measure up to the standard of invention as it is written into the Constitution and applied by the Supreme Court and by this Court.

2. The claims of the Reading patent are invalid in that they do not particularly point out and distinctly claim an identifiable invention as required by the Statute.

3. The Reading claims cover nothing more than a description of the function of an apparatus.

4. The Reading process merely follows the teachings of the prior art.

In addition, the District Court in making its findings completely overlooked the state of the art at the time Reading filed his application for Letters Patent which resulted in the issuance of the patent in suit. For example, Finding IV (R. 55) would lead one to believe that the only method of applying rubber cement to a tire carcass, at the time Reading filed his application for Letters Patent, was by brushing the rubber cement on the tire, resulting in a heavy wet coating, and that it was necessary thereafter to store the tire in a dust-free and fire-proof

room for a period of several hours or several days before the camelback or treadstock could be applied to the tire, and that vapor pockets and blow holes were common in retreaded tires at this time.

In Finding V (R. 57) made by the District Court, it is stated that the practice of applying rubber cement to a tire carcass, at the time Reading entered the field, created a serious health and fire hazard because of the excess of rubber cement that was applied to the tire by said brushing practice, and also that it was impossible to supply a retreaded tire to a customer within a short period of time or even the same day.

Both Findings IV and V completely ignore the evidence of this case which established that Cahill in the early part of January 1953 developed a spray method of applying rubber cement to tire carcasses which was substantially identical to the Reading patented method. This spray method of Cahill overcame all of the objections of the old prior brushing method recited in Findings IV and V. Said Cahill method was practiced continuously from February 7, 1953 until June 12, 1957, by Mr. Hartman who was given one of the Cahill spray devices on February 7, 1953. The record also establishes that Mr. Cahill sold many of his spray devices for use by tire retreaders in Virginia and North Carolina more than a year prior to the filing of the Reading application (R. 625-628).

These findings also ignore the fact that Mr. Reading, the patentee, used a spray process substantially identical to the one disclosed and claimed in the Reading patent from December 1951 until October 1953. This prior Read-

ing process overcame all of the disadvantages of the old paint brush method referred to in Findings IV and V. The record does not support Findings IV and V made by the District Court but rather supports Findings IV, V, VI, and VII submitted by appellant on objecting to appellees' proposed Findings set forth in this record at pages 42 to 44.

Finding VI (R. 58) is clearly erroneous because Mr. Reading did not work continuously to perfect and develop his method of spraying rubber cement from December 7, 1951 to December of 1953. Reading's patented process, in view of Cahill, Hartman and the Reading prior use, was not a safer, faster and cheaper method of preparing tires for retreading and did not revolutionize the prior art. Again, we submit that the District Court erred in making said Finding VI and ignored these prior uses of Cahill, Hartman and Reading. During the period from December 7, 1951 to December of 1953, the only experimentations that Mr. Reading made was on one passenger tire (R. 272-273 and on four truck tires (R. 274). This experimentation did not by any stretch of the imagination cover the purported change of the Reading patented process over the prior Reading process. It was not until October of 1953, when Mr. Reading picked up his spray pot and manually shook it (R. 275),[7] that the process of the patent in suit was allegedly developed. The record herein supports appellant's proposed Finding VI set forth at R. 44.

Again, the District Court erred in making Finding VII (R. 58). Certainly, the Reading process did not run con-

[7]Shaking the pot in this manner was nothing more than the old step of agitation taught by many of the prior art patents.

trary to the Cahill and Hartman prior uses or the Reading prior use as said finding states. The Reading patented process is substantially identical to these prior uses. It is also susbtantially identical to the normal spray method that would result from the use, by one skilled in the art, of the Shelburne and Gradolph devices. With respect to the prior art teachings, it is submitted that appellant's proposed Findings IV, V, VI and VII (R. 42-44) more clearly set forth the facts as established by this record.

Finding VIII (R. 59) as made by the District Court is in error because it infers that Reading was the first to introduce air in a fluid (cement in the case of Reading) to form a dispersion of gas under pressure in a fluid. The District Court ignored the many patents of the prior art, particularly the patents to Shelburne, Gradolph, McLean et al. and McIntosh, which disclose the introduction of air into a fluid in a spray device. This particular finding is much broader than the disclosure of the Reading patent because it states that the said dispersion of gas is created "by bubbling air into the cement or otherwise dispersing the air therein as by agitation, mixing, beating or the like,". The only disclosure in the Reading patent is that Reading forms an emulsion of air and cement by dispersing gas into the cement at a high initial pressure and then reduces said pressure prior to the application pressure for spraying the emulsion of air and gas.

We have no quarrel with the use of the word "emulsion" in the Reading patent. However, we do contend that for a proper understanding of this word, as used in the claims of the Reading patent, one must refer to the specification of said patent and limit the claims by the disclosure of said specification.

Finding IX (R. 59) is in error in that this finding also ignores the prior uses of Cahill, Hartman and Reading. Mr. Cahill testified (R. 647) that there was no fire or dust hazard in the use of his method. Mr. Reading testified (R. 356) that cobwebbing could be corrected by thinning the cement. This, of course, is well known to those skilled in the art.

Finding X (R. 61) is in error because it is submitted that the Reading process is merely a descripition of the function of the Reading apparatus. As a matter of fact, the only description of the Reading process, contained in the Reading patent, is the describing of the function of the apparatus disclosed in said patent. We believe this subject matter is clearly and fully described in a prior portion of this brief found at pages 36-41.

The District Court Finding XI (R. 61) is also in error, particularly in that it states that the presumption of validity of the patent in suit is unaffected by the prior art. It is submitted that the best prior art was not before the Patent Office during the prosecution of the Reading application. In particular, the prior use and sale by Cahill and the prior uses of Hartman and Reading were not considered by the Patent Office, nor were the prior patents to Shelburne, Gradolph or McLean et al. considered by the Patent Office. All of this prior art, not considered by the Patent Office, anticipates the Reading invention.

Finding of Fact XII (R. 61) is in error and we refer the Court to pages 57-66 of this brief wherein the question of infringement is fully discussed. It is submitted that the process resulting from the use of appellant's device does not come within the disclosure and claims of the Reading patent.

Finding XIII (R. 62) stating that the Reading patent and the claims thereof are valid is, we contend, clearly in error.

Again, Finding of Fact XIV (R. 62) is in error in that the actions of appellees in the widespread notification of appellant and its customers of infringement by letter and by advertisement certainly constituted unfair competition.

Finally, Finding XV (R. 62) of the District Court is in error because there was no bad faith on the part of appellant in its acts of manufacturing and selling an old well-known spray device for use in spraying rubber cement on a tire carcass, another old and established step in tire retreading, and the District Court's finding of bad faith is completely unsupported by this record.

It is difficult to understand, on the basis of the record of this case, how the District Court made the findings it entered. To make these findings was to ignore the evidence. We submit that all of the findings made and entered by the District Court, respecting validity, infringement, bad faith and unfair competition, are clearly erroneous and that the decision of the District Court should therefore be reversed.

APPELLEES, BY WHOLESALE NOTIFICATION OF INFRINGEMENT OF APPELLANT'S CUSTOMERS WAS GUILTY OF UNFAIR COMPETITION.

The appellees are guilty of unfair competition in that they promiscuously and recklessly sent letter notices of infringement to seventy-eight distributors and jobbers of tire retreading equipment (R. 602), many of whom were customers of appellant (R. 603), and then after the mailing

of these notices, they published a notice in a trade journal threatening every distributor, jobber and user of spray equipment with patent infringement (R. 231). After the sending of the letters and the publication of the notice in the trade journal, appellees sat back and did nothing with respect to the alleged infringement of their patent. This resulted in inquiries by appellant's customers with respect to the alleged infringement (R. 244), and resulted in the decline of appellant's business to such an extent that it was necessary for appellant to bring this declaratory judgment action to save its business (R. 247).

Such action on the part of appellees has often been characterized as unfair. In the case of *United States v. Patterson et al.*, 205 F. 292, 299, the Court said:

> " * * * A patentee may properly warn the offending competing manufacturer, and may call attention to his patent and his claim of infringement; but when he threatens suit and does not bring it, or engages in acts of unfair competition, a court of equity will say to him: ,
>
> > 'Hold your hand; if you really have a patent, if the competitive concerns of which you complain are really infringing your patent, take the method the patent law has given you of establishing your monopoly by excluding your competitors, by enjoining them or seeking damages in the courts of the United States; otherwise, you interfere with your competitors' business at your peril.' "

Also, in the case of *Dittgen v. Racine Paper Goods Co.*, 164 F. 85, 89, the Court said:

> "It is the settled policy of the courts to restrain the illicit use of letters patent to maliciously injure the trade of competitors, whether the methods chosen

> are a multiplicity of suits brought against users to inspire terror and divert the trade (Commercial Acetylene Co. v. Avery Co. [C. C.] 152 Fed. 642), or circulars maliciously and persistently distributed among the trade threatening suit against all users of the alleged infringement, not for the legitimate purpose of giving notice of the patentee's claims, but to terrify the customers of the alleged infringer. * * *"

In the recent case of *Beacon Theatres v. Westover,* 252 F. 2d 864, 873, this Court recognized the damage that can result from the threatening of customers, where it said:

> "* * * Such threats carry with them the implication that the distributors also may have to defend treble damage suits."
>
> * * * * * *
>
> "* * * Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; and as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited."

CONCLUSION.

We respectfully submit that this Court should find the patent in suit and the claims thereof totally invalid upon each of the following grounds:

a. That the patent does not disclose a patentable invention.

b. That it required only mechanical skill to produce the process claimed in the patent.

c. That the patent is anticipated by the prior art.

d. That the patent is invalid because of prior public use.

e. That the claims of said patent in suit define nothing more than the function of a machine.

f. That the claims of the patent in suit do not particularly point out and distinctly claim an identifiable invention as required by 35 U.S.C. Section 112.

We further respectfully submit that this Court should find that appellant did not infringe claims of the patent in suit.

It is further submitted that the District Court was in error in awarding attorneys' fees to appellees.

It is further respectfully submitted that the District Court's Findings of Fact and Conclusions of Law, that the patent in suit involved invention and was infringed by the appellant, are in error and that the portion of the judgment of the District Court judging said patent valid and infringed should be reversed, as should that portion awarding appellees attorneys' fees.

Dated, San Francisco, California,
September 3, 1958.

MELLIN, HANSCOM & HURSH,
By JACK E. HURSH,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Appellant's Exhibits:

Exhibit Number	Identified	Offered	Received	Rejected
1	73	73	73	
2	73	73	74	
3	74	74	74	
4	74	75	75	
5	75-76	76	76	
6	76-77			
7	93	94	94	
8	96	96	96	
9	147	188	188	
10	147	188	188	
11	147	188	188	
12	147	188	188	
13	147	188	188	
14	147	188	188	
15	147	188	188	
16	147	188	188	
17	206	210	210	
18	211	212	212	
19	245	485	485	
20	249	250	250	
21	249	250	250	
22	249	250	250	
23	384	384	384	
24	490	499	499	
25	500	500	501	

Appellee's Exhibits:

Exhibit Number	Identified	Offered	Received	Rejected
A	Prior to testimony			
B	Prior to testimony	138-139	139	
C	Prior to testimony	298	299	
D	Prior to testimony	307	307	
E	Prior to testimony	310	310	
F	Prior to testimony	239	239	
G	Prior to testimony	318	318	
H	Prior to testimony	310	310	
I	Prior to testimony	310	311	
J	Prior to testimony	305	306	
K	250			
K-1	250			
L	250	324	324	
M	147	147	147	
N	Prior to testimony			
O	Prior to testimony			
P	Prior to testimony	239	239	
Q	147	468	468	
R	Prior to testimony			
S	Prior to testimony	266	266	
T	71	318	318	
U	71	192	192	
V	233	234	234	
W	233	234	234	
X	250	303	305	
Y	265	267	267	
Z	414	416	417	
AA	414	416	418	
AB	459	459	459	
AC	479	479	480	
AD	483	483	483	
AE	485	485	485	
AF	497	498	498	

No. 15,986

IN THE

United States Court of Appeals

For the Ninth Circuit

ELRICK RIM COMPANY, a copartnership consisting of M. C. Elrick and M. B. Champlin,

Appellant,

vs.

READING TIRE MACHINERY CO., INC., a corporation, and RALPH R. READING, an individual,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANT, ELRICK RIM COMPANY, A COPARTNERSHIP CONSISTING OF M. C. ELRICK AND M. B. CHAMPLIN.

MELLIN, HANSCOM & HURSH,
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Subject Index

Table of Authorities Cited

Cases

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PRELIMINARY.

To simplify the issues for the Court, we find it necessary to reply briefly to Reply Brief On Behalf Of Appellees, Reading Tire Machinery Co., Inc., A Corporation, And Ralph R. Reading, An Individual.

APPELLEES' ARGUMENT THAT THE PRIOR ART ESTABLISHED ONLY "DIP-AND-DAB" PROCESS IS CONTRARY TO THE EVIDENCE.

Appellees are completely in error when they represent to this Court that at the time Reading filed his applica-

tion for the patent in suit the only method of applying rubber cement to a tire carcass to hold the camelback in place during retreading was the "Dip-And-Dab" process. In making this contention, Appellees ignore the prior use process of Cahill and Hartman, where rubber cement was sprayed on tire carcasses for holding the camelback on a tire, and prior use by appellee, Ralph R. Reading, that began in December 1951, wherein a process was used substantially identical to the patented process.

On cross-examination Reading made this admission with respect to this prior use:

> "Q. As I understand your testimony now, Mr. Reading, from some time in 1951 continuously down to the present time you have been using a spray method in applying cement to buffed tires in your shop?
>
> A. Yes. There was a period when I first started that we stopped it long enough to determine whether or not this spray method was going to work on the first three tires that we turned out that way, and after we had determined that they were good, safe sprayed tires, we have sprayed cement continuously since that time." (R. 350-351.)

It should be pointed out that in the above-quoted testimony Reading admitted that the tires retreaded employing this spray method of applying rubber cement "were good, safe sprayed tires".

This Reading prior use was more than an experiment. Reading so testified on cross-examination at R. 352, where he said:

> "Q. Yes. Now, as I understand it, how long was that particular process that you have just described used? From 1951 to when?

A. We used it up until about—except for experimental, to which I have previously testified, we used that continuously up until some time in September, I believe, of—well, let's say August or September of 1953. It might even have been up into October.

Q. Then during all of that time all of the tires that were retreaded in your shop used this particular spray method of applying the rubber cement, from 1952 down until September, or thereabouts, in 1953?

A. Yes.

Q. And how many tires a month do you retread in your shop on an average?

A. Oh, on the average, oh, three to four hundred."

The prior use by Cahill overcame all of the objections of the prior paint-brush application of rubber cement. Cahill testified that the tires retreaded by his method were satisfactory, that said method saved material, eliminated the necessity of a drying room, camelback was applied to the tires immediately, better bond between tire and camelback resulted and elimination of fire hazard. Cahill's testimony in this regard is as follows:

"Q. State whether or not there were any benefits in using your new method in spraying rubber cement on tires during the retreading process over the former method of painting the tire with a rubber cement by brush?

A. There was many advantages in spraying the cement applied by a brush. My invention saved a lot of cement applied by a brush. My invention saved a lot of space in the recapping plant due to the fact that it eliminated the drying room, which was dust proof and tires would hang in there and dry for 45 minutes to an hour before the camelback was applied, but with this method of mine in spraying cement on the camel-

back was applied immediately after the cement was sprayed on. By spraying the cement on they could get more work through their molds in a day. It also gave a better bond between the old carcass and the new rubber that was being vulcanized on the tire. The strength was much more. It eliminated a lot of headaches the recapping industry was experiencing. It saved them a lot of money and time and is the only thing that has been done in the recapping industry for many years that enabled them to do a better job at less cost.

Q. Would you state whether or not there was any material saving?

A. There was about a seventy-five (75) per cent of the material saving in this method of spraying cement of mine.

Q. Would you state whether or not there was any reduction in the fire hazard?

A. It was found that it was much safer than the old method of the open bucket. We made tests by using torches in the spray pattern and it was hard to ignite the cement and it was hard to ignite the cement after it had been applied to the tire." (R. 646-647.)

The Cahill prior use also sprayed a thin film of cement on the tire; Cahill so testified at R. 660-661 on cross-examination, where he said:

"Q. So, your method comprises spraying on a rather heavy coat and breaking it up with brushes in the solvent?

A. My method teaches you can put on a thin film of cement. If you just imagine how you have to change something over that has been practiced for years and years, how hard it is to turn a man right around in the way he has been taught to do some-

thing and the brushes assisted me in bringing about the spray method. I hope I'm clear on that."

THERE WERE NO "SPRAY PROBLEMS" ENCOUNTERED IN THE CAHILL AND HARTMAN PRIOR USES.

There is not one iota of evidence that the Cahill prior use resulted in the cobwebbing of the rubber cement or that settling or separation of cement solids posed any problem. As is pointed out above, the Cahill spray process saved material, put on a thin coating of cement, and eliminated fire hazard.

Reading, on cross-examination (R. 356), admitted that the best way to avoid cobwebbing was to thin the rubber cement with solvent, stating:

"Q. Isn't the best way to stop cobwebbing by thinning the solution?

A. That is a great help.

Q. That is the best way to do it, and if you have cobwebbing, the best thing to do and the first thing to do would be to thin your solution, wouldn't it, with more solvent?

A. Yes, sir; providing you didn't get beyond where the material would be good and tacky on your tire. You have to have a relation between the two." (R. 356.)

READING'S ACHIEVEMENTS ALL FOUND IN PRIOR USES.

Reading's patented process achieved no results that are not found in the Reading prior use or in the Cahill and Hartman prior uses. For example, the above-quoted testimony of Cahill establishes that they sprayed a substan-

tially dry thin coat of cement, eliminated drying time, revised the theory of the prior paint method and provided a firmer bond. No proof was made on cross-examination of this witness that they were troubled by cobwebbing or separation of solids; the only evidence is that the Cahill process was completely satisfactory.

IF READING'S INVENTION WAS THE PRODUCTION OF A NONFLAMMABLE SPRAY, SUCH A SPRAY SHOULD HAVE BEEN CLAIMED.

Appellees contend that one of the most important features of the Reading patented process is that it produces a nonflammable spray. The nonflammability of the spray is not claimed. As a matter of fact, the claims of the Reading patent cover a flammable spray. This subject is fully covered in appellant's opening brief, pages 30 to 32, and the Court is respectfully referred thereto.

Appellees cite the new patent statute, 35 U.S.C. Sec. 100, to the effect "that the term 'process' in patent law includes 'a new use of a known * * * machine'." We submit that appellant did not make a new use of a known machine but merely made an analogous use of a known machine. So far as Reading's contribution is concerned, spray painting was old; spraying rubber cement on tire carcasses was old and the method of so spraying was old. Reading merely took an old paint spray pot and employed it to spray rubber cement. The process employed by Reading was inherent in the operation of the old paint spray pot. The only thing Reading did was to adjust air pressures, and such adjustment of air pressure is within the skill of any mechanic in the art. As a matter of fact, the

claims of the Reading patent do not specify any particular air pressures. Mr. Stringfield, Appellee's expert, admitted on cross-examination, that one skilled in the art would know how to adjust pressures within the limits of the apparatus being used. His testimony appears at R. 431 and is as follows:

> "Q. You still haven't answered my question, Mr. Stringfield. I said, and I asked you if it is not a fact that a person skilled in the art of spray painting, or using a spray gun, can adjust pressures and adjust the amounts of fluid for the occasion for which he desires to do that spraying?
>
> A. He can make all the adjustments within the limits of his apparatus, yes."

The Court of Appeals for the Seventh Circuit has recently ruled on this question in the case of *B. & M. Corporation v. Koolvent Aluminum Awning Corporation of Indiana,* 118 U.S.P.Q., 191, 194, where it said:

> "Invention does not consist in the mere conception of applying an old device to a new use if the new use is so analogous to the old that the thought of adopting the device and applying it to the new use would occur to one skilled in the art and seeking to devise means to perform the desired function. Nor is invention involved in such a case even though some changes or modifications are necessary to the practical application of the device to the new use. Concrete Appliances Company v. Gomery, 1925, 269 U.S. 177, 185; International Steel Wool Corporation v. Williams Co., 6 Cir., 1943, 137 F. 2d 342, 346, 58 USPQ 372, 376."

Also the Fifth Circuit discussed this question in the case of *The Fluor Corporation, Ltd. v. Gulf Interstate Gas Company,* 119 USPQ 1, 3, stating:

"It is not invention to use an old process or an old machine for a new and analogous purpose. Here the use of the old device was analogous to its former use, was taught in the prior art, and produced only the result which might have been anticipated. It did not involve an exercise of the inventive faculty. That conclusion is not negatived by evidence of unsuccessful efforts upon the part of a few others not shown to be familiar with the specific prior art, nor can commercial success supply the lack of invention."

The Court of Appeals for the Second Circuit has also recently ruled on the question of new use in the case of *Zoomar, Inc. v. Paillard,* 118 USPQ 392, 394-395 (August 18, 1958), stating:

"* * * Invention is more than recognition of latent qualities in prior art without any physical or objective change in that art. General Elec. Co. v. Jewel Incandescent Lamp Co., 326 U.S. 242, 67 USPQ 155; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U.S. 11; and see dissenting opinion of L. Hand, J., Jungersen v. Baden, 2 Cir., 166 F. 2d 807, 811, 76 USPQ 488, 491, quoted in dissenting opinion of Frankfurter, J., Jungersen v. Ostby & Barton Co., 335 U.S. 560, 568, 80 USPQ 32, 35. * * * For it is 'settled law beyond the need of citation that the adaption of a machine for a new use does not entitle one to a patent if the idea of the new use is suggested by analogous art and invention may not be perceived in the adaption,' Buffalo-Springfield Roller Co. v. Galion Iron Works Mfg. Co., 6 Cir., 215 F. 2d 686, 688, 103 USPQ 72, 74-75.

And since the Patent Office did not consider the Michel and Richter disclosers when it approved plaintiff's application, there can be no strong pre-

sumption of validity from its action. See Georgia-Pacific Corp. v. United States Plywood Corp., 2 Cir., 118 USPQ 122."

APPELLEES ARE IN ERROR CONTENDING THAT READING'S EMULSION STEP IS NEW, CLEAR, INVENTIVE AND INFRINGED.

It is believed that the contention raised by Appellees in their reply brief that the emulsion step is new, clear, inventive and infringed is fully answered in appellant's opening brief, pages 53 to 66. In this section of our opening brief it is pointed out that to form his emulsion, Reading added to his prior process an air inlet tube that terminated adjacent to the bottom of his tank—an expedient old in the art as shown in the prior patents to Shelburne, Gradolph or McLean, et al. An important factor with respect to these patents is that no one of said patents was considered by the Patent Office during the prosecution of the Reading application in the Patent Office. This addition would be within the skill of any mechanic in the art.

The Supreme Court in the case of *Cuno Engineering Corporation v. Automatic Devices Corporation,* 314 U.S. 84, 62 S. Ct. 37, 41, in passing on skill of the art, said:

> "* * * A new application of an old device may not be patented if the 'result claimed as new is the same in character as the original result' (Blake v. San Francisco, 113 U.S. 679, 683, 5 S. Ct. 692, 694, 28 L. Ed. 1070) even though the new result had not before been contemplated. Pennsylvania R. R. Co. v. Locomotive Engine Safety Truck Co., 110 U.S. 490, 494, 4 S. Ct. 220, 222, 28 L. Ed. 222, and cases cited. Certainly the use of a thermostat to break a circuit

> in a 'wireless' cigar lighter is analogous to or the same in character as the use of such a device in electric heaters, toasters, or irons, whatever may be the difference in detail of design. Ingenuity was required to effect the adaptation, but no more than that to be expected of a mechanic skilled in the art."

Also, in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp. et al.,* 340 U.S. 147, 71 S. Ct. 127, 130, the Supreme Court, discussing the same subject, said:

> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

Passing now to the question of infringement, again we refer the Court to appellant's opening brief, pages 57 to 66, where this question is fully considered.

Appellees, on pages 14 to 16 of their reply brief, in an attempt to establish infringement, have completely misconstrued and misinterpreted the testimony of the witness Petersen. They endeavor to mislead by contending that Petersen admitted that in the Elrick process there is a

supersaturation of air in the cement. This is not so and Petersen did not so testify.

Appellees quote certain of Petersen's testimony, leaving out the prior related testimony. Appellees quote the following testimony (R. 519):

> "Q. Yes. So that when you dropped it to 10 pounds, you would then have supersaturation at 10 pounds?
>
> A. Presumably, yes."

The true context of this testimony is as follows:

> "Q. (By Mr. Herzig): Now, you say that in Reading—in the Reading apparatus, following the teaching of Reading, upon release—first, upon saturation of the material with air by bubbling, then the release of that pressure, you had a supersaturated atmosphere as well, is that correct, in the cement—that you have supersaturation in the cement?
>
> A. We did not have saturation, I am sure, because 10 seconds would not be long enough to make saturation, but there would probably be a solubility in excess of that at 10 pounds per square inch.
>
> Q. Yes. So that when you dropped it to 10 pounds, you would then have supersaturation at 10 pounds?
>
> A. Presumably, yes." (R. 519.)

Dr. Petersen, at R. 519 (testimony above-quoted), where he was asked the question respecting supersaturation and answered, "Presumably, yes", was discussing a test employing the Reading process where the initial pressure was 40 pounds and this initial pressure was dropped to 10 pounds. There is no release of pressure (as indicated in said prior question) in Elrick but only a constant pressure of 10 pounds.

No witness testified that at any time, in the Elrick process, you have a supersaturation of the cement with air. Mr. Stringfield, appellees' expert, at R. 444-445, admitted that Elrick did not form a cement supersaturated with air, stating:

> "Q. So, as I understand your answer now, there would be no supersaturation in the Elrick tank?
>
> A. Presumably in the tank itself there might not be supersaturation.
>
> Q. There would not be supersaturation, that is the fact, isn't it?
>
> A. Yes, I think you are right there."

Appellees, page 15 of their reply brief, made a great "to do" over the fact that in the tests run by appellant, they passed air through the cement in the Elrick tank for two minutes. Appellees claim that the tests were rigged. Appellees, in so contending, refuse to give the instructions for use of the Elrick device (Ex. 8, R. 833) their proper scope. These instructions say: "Allow air to pass through tank for *about* 3 minutes . . .". The instructions do not make it mandatory that air be passed through the tank for 3 minutes but only *about* 3 minutes and, we submit, 2 minutes falls within the scope of this language.

Again, on page 15 of appellees' reply brief, they say: "Also, that saturation at any given pressure gives supersaturation at a lesser pressure, e.g., at the nozzle of the spray gun." Reading can make no claim to said function of the nozzle of the spray gun. In the use of any pressure spray gun, the fluid at the nozzle of the spray gun is reduced, atomized and mixed with a large volume of air. Whether the fluid at the nozzle is supersaturated or not makes no difference because the amount of fluid sprayed

is so minute that air entrained in the fluid would have little or no effect. Dr. Petersen so testified at R. 513, where he said:

> "Q. From the tests that you witnessed, would the dispersion of the entrained air in the fluid in the tank have any effect on the spraying characteristics of the cement?
>
> A. I would say that the amount of air in the independent stream is so much greater than the amount of air that is entrained in the form of small bubbles in the cement, that when the cement meets this blast of independent air, there could be little or no effect of the small bubbles in the cement on the characteristics of that spray."

PUBLIC USE BY READING, CAHILL AND HARTMAN WAS CLEARLY ESTABLISHED.

It is submitted that the record of this case establishes without any doubt that Reading, Cahill and Hartman practiced methods of spraying rubber cement on tire carcasses substantially identical with the patented process, long prior to one year before Reading filed his application for Letters Patent. The Court is respectfully referred to the discussion of prior uses in appellant's opening brief, pages 41 to 46.

ATTORNEYS' FEES ARE UNWARRANTED.

It is believed that appellant's opening brief fully discusses the question of attorneys' fees and the Court is referred to pages 66 to 70 of said brief.

WHOLESALE NOTIFICATION OF INFRINGEMENT NOT JUSTIFIED.

Appellant has no quarrel with appellees when they contend that they are entitled fairly to notify infringers. However, when appellees sent out notices of infringement to some seventy-eight distributors and jobbers of tire retreading machinery (R. 602), thereafter published a notice in a trade journal threatening every distributor, jobber and user of spray equipment with patent infringement (R. 231), and then did nothing to pursue their rights, we consider it unfair. If appellees had pursued their right and filed a suit for infringement, showing their good faith, appellant would have no complaint.

As the Court said in *United States v. Patterson et al.*, 205 F. 292, 299:

> "* * * A patentee may properly warn the offending competing manufacturer, and may call attention to his patent and his claim of infringement; but when he threatens suit and does not bring it, or engages in acts of unfair competition, a court of equity will say to him:
>
> 'Hold your hand; if you really have a patent, if the competitive concerns of which you complain are really infringing your patent, take the method the patent law has given you of establishing your monopoly by excluding your competitors, by enjoining them or seeking damages in the courts of the United States; otherwise, you interfere with your competitors' business at your peril.' "

PRESUMPTION OF VALIDITY DESTROYED WHEN BEST ART NOT CITED BY PATENT OFFICE.

It is submitted that the law is clear that the presumption of validity is destroyed when the best art is not considered by the Patent Office.

This Court of Appeals has many times followed this rule. For example, in the case of *Gomez v. Granat,* 177 F. 2d 266, 268, this Court said:

> "None of these prior patents were cited or considered by the patent office during the prosecution of the patent application for the Granat patent. In this situation it is argued that the presumption of prima facie validity is greatly weakened if not destroyed when pertinent prior art is not cited or considered by the patent office, and this court has so held. Stoddy v. Mills Alloys, 9 Cir., 67 F. 2d 807; Mettler v. Peabody Engineering Corp., 9 Cir., 77 F. 2d 56; McClintock v. Gleason, 9 Cir., 94 F. 2d 115."

See also:

Jacuzzi Bros., Inc. v. Berkeley Pump Co., 9 Cir., 191 F. 2d 632;

Syracuse v. Paris, 9 Cir., 234 F. 2d 65.

There is no question but that the best art was not considered by the Patent Office. For example, the prior patents to Shelburne, Gradolph and McLean, et al., and the prior uses of Reading, Cahill and Hartman were not considered by the Patent Office during the prosecution of the Reading patent application. Thus, we submit that the presumption of validity of the Reading patent in suit is destroyed.

If, as stated by appellees (page 32, appellees' reply brief), nonflammability was one of Reading's greatest

contributions, why do the Reading claims cover both flammable and nonflammable sprays? This subject is fully discussed in appellant's opening brief, pages 30 to 33.

With respect to precipitation of solids, if mere agitation of the fluid in the tank accomplishes this, as Reading contends by charging Elrick with infringement, then Reading contributed nothing in the art, for this step is old. For example, the prior art patents to Shelburne (Ex. 4, R. 765), Gradolph (Ex. 4, R. 753) and McLean, et al. (Ex. 4, R. 759) teach the identical agitation employed by Elrick, and the patents to Barton (Ex. 4, R. 780), Paasche (Ex. 4, R. 785), Seweryn (Ex. 4, R. 791), Kline (Ex. 4, R. 795), Davis (Ex. 4, R. 818) and McIntosh (Ex. 4, R. 8291) also disclose agitation of a fluid in a spray device by passage of air through the fluid in a tank. There was nothing new in Reading in this step of his process.

THE CHARACTER OF THE WITNESSES.

There was no substantial conflict in the testimony. Therefore, the District Court's decision was not based upon any conflict in the testimony.

All of the witnesses testified to the facts as they believed them to be. When all of the evidence is reviewed, we believe that this Court must reach the conclusion that the patent in suit is invalid and not infringed.

THE FINDINGS OF THE DISTRICT COURT ARE CLEARLY ERRONEOUS.

As was carefully pointed out in appellant's opening brief, we believe the District Court, in preparing its findings, overlooked the state of the art at the time Reading filed his application for Letters Patent and also failed to apply the strict standard of invention applied by this Court and the Supreme Court.

We respectfully refer the Court to the complete consideration of the findings, and why they are clearly erroneous, set forth in appellant's opening brief, pages 71 to 76.

CONCLUSION.

In our opening brief we very thoroughly discussed all of the defenses raised on this case. In this reply we merely answered specifically the arguments presented by appellees. To sustain appellees' contentions would be tantamount to granting to appellees, for the full term of the patent in suit, the exclusive monopoly in the use of an old, well-known paint spray pot for the spray painting of rubber cement, a process used in the art long before the Reading patent. We urge such a broad grant is contrary to law and contrary to public interest.

We further submit that the Reading process is not an invention subject to patent protection in that it does not measure up to the standard of invention as laid down by the Supreme Court and by this Court.

We further submit that the Elrick process does not infringe the claims of said Reading patent when those claims are read in light of the Reading specification.

We submit that the District Court erred as set out in the specification of errors in our opening brief, and that the judgment should be reversed.

Dated, San Francisco, California,
October 17, 1958.

Respectfully submitted,
MELLIN, HANSCOM & HURSH,
JACK E. HURSH,
Attorneys for Appellant.

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No. ~~15590~~

COURT OF APPEALS

for the Ninth Circuit

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

REPLY TO APPELLEE'S SUMMARY AND ARGUMENT

Throughout its brief, the government stresses the testimony given by its informers Knipe and Wilmot that appellant attended a number of meetings held under auspices of the Communist Party. It also seizes upon some vague references in this testimony to appellant's

presumed role as someone "annointed" and in the "top fraction" of the Communist Party. Nowhere does the government refer to meaningful explanations of these generalizations. The record is devoid of testimony as to what these condemnatory terms are supposed to mean when used by these government informers.

Certainly the government has failed to produce from such testimony a picture of appellant being a "politically aware" member of the Communist Party. Even if it is granted for the sake of argument that appellant attended Communist meetings, under the *Rowoldt* doctrine, more is required to provide a basis for deportation. Some political motivation, some evidence of knowledge and approval of Communist political ideology and aims there must be before the harsh penalty of deportation can be imposed.

If *Rowoldt* teaches anything, it is that attendance of Communist meetings and even payment of party dues is insufficient to justify the inference of political awareness. And when the government's case is searched for substantial evidence that appellant had a politically aware association with communism, one can only conclude that in fact the opposite is true: that appellant's whole course of activity during the depression years was motivated solely by a desire to improve his economic situation, to obtain unemployment compensation and relief. Such an economic motive for membership in the Communist Party excused Rowoldt. It likewise should relieve appellant from being deported to a strange and alien land.

Appellee asserts that the facts in this case are almost identical to those in *Schleich v. Butterfield,* 252 F2d 191, 356 US 971. However, Schleich was accused by the two government informers who testified against him of being an active organizer and recruiter of members for the Young Communist League and the Communist Party. Moreover, these witnesses also said that Schleich attended high level conferences of party leaders to report on his important assignments. The testimony in the case at bar certainly does not go this far.

It is significant that the Supreme Court in the Schleich case caused the record to be returned to the Immigration Service to be used in a hearing on Schleich's contention that he is not deportable under *Rowoldt.* At the same time, the Supreme Court retained jurisdiction of the cause in case of a decision adverse to Schleich. Thus, Schleich receives a hearing on the very issues on which appellant has requested a new hearing.

If due process requires a new hearing for Schleich, does it not also require a new hearing for appellant if it is true, as the government asserts, that the cases are similar?

CONCLUSION

The judgment of the District Court should be reversed and the warrant of deportation quashed and held for nought; or, at least, the Immigration Service should be required to hold a new hearing to receive evidence on the question of the nature of appellant's alleged association with the Communist Party.

Respectfully submitted,

NELS PETERSON,
GERALD H. ROBINSON,
Attorneys for Appellant.

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vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

This is an appeal from a final Order dismissing Appellant's Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action. Reference is made to the Petition (R. 3), the Return to the Writ of Habeas Corpus and Answer to the Petition (R. 27) and the Order dismissing the Petition and

discharging the Writ (R. 35).*

The jurisdiction of the District Court was invoked under Title 28, USC, Section 2241, 62 Stat. 964, and Title 5, USC, Section 1009, 60 Stat. 237.

The jurisdiction of the Court of Appeals is invoked under Title 28, USC, Section 2253, 62 Stat 967, and Title 28, USC, Section 1291, 62 Stat. 929.

The validity and interpretation of the following statute of the United States is involved: The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, now Section 1251 (a) (6) (c), Title 8, USC.

STATEMENT OF THE CASE

Appellant is an alien, born in Finland, November 24, 1908. He entered the United States in 1909 and has resided in this country continuously since then. He is duly registered under the Alien Registration Act (Tr. 4, 5).

Appellant has resided in Portland, Oregon for about 33 years where he follows the trade of painting (Tr. 186). He is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). Appellant himself was drafted in 1944 and served 95 days in the Army, receiving an Honorable Discharge for medical reasons (Tr. 8, 9).

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* In this Brief, "(R....)" refers to the printed record of proceedings in the U. S. District Court, and "(Tr....)" refers to Exhibit 1, the typewritten transcript of the hearings before the Immigration and Naturalization Service.

On June 17, 1952, a warrant for the arrest and deportation of Appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service and the same was served upon Appellant on or about September 12, 1952. The basis of the warrant was the allegation that Appellant had been a member of the Communist Party of the United States after entry into the United States during the years 1937-39.

A hearing was held before Louis C. Hafferman, Special Inquiry Officer on May 11, 1953 in Portland and thereafter, Mr. Hafferman issued a written decision holding Appellant deportable. A timely appeal to the Board of Immigration Appeals of the Department of Justice was taken and on September 8, 1953, said Board issued an order dismissing the appeal.

On February 2, 1955, pursuant to motion of Appellant, a further hearing was held before Mr. Hafferman on Appellant's application for suspension of deportation. Suspension was denied, and the Board of Immigration Appeals affirmed the ruling.

On December 13, 1954, Appellant filed a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the U.S. District Court for the District of Oregon. On March 6, 1956, the Court dismissed the suit. An appeal was taken to this Court (No. 15061), *Niukkanen vs. Boyd,* 241 F.2d 938, where the District Court was affirmed. A petition for a writ of certiorari to the Supreme Court was denied December 16, 1957. 2 L. Ed. 2d 259.

In this suit Petitioner challenged the constitutionality of the statute under which he was arrested; asserted that there was insufficient evidence in the record to support deportation; and maintained that the denial of suspension of deportation was arbitrary and an abuse of discretion, and in violation of the law.

In the meantime, on December 9, 1957, the Supreme Court decided the case of *Rowoldt vs. Perfetto,* 355 U.S. 115, 2 L. Ed. 2d 140, in which the Court voided the deportation order of an alien because his admitted association with the Communist Party was not shown to have been of a "meaningful" political nature.

Thereafter, Petitioner filed a motion with the Board of Immigration Appeals requesting a new hearing on the question of the nature of his alleged association with the Communist Party, and in that proceeding he asserted that the record, as it stood, would not support the conclusion that he had a meaningful political association with the Communist Party. The Board on March 6, 1958, denied the motion and filed an opinion which is part of Exhibit 1, the Immigration and Naturalization Service file.

On April 3, 1958, Petitioner was notified by Mr. Ernest Hover, then District Director of the Immigration and Naturalization Service, to surrender in four days for deportation to Finland. The following day, a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief was filed in the District Court, alleging that the administrative order of March 6, 1958 was arbitrary, capricious and not supported by substantial evidence in

the record; that he has been denied a fair hearing on the question of whether his alleged membership in the Communist Party was a meaningful political association within the scope and meaning of *Rowoldt v. Perfetto;* that the statute under which respondent seeks to deport Petitioner is unconstitutional because it is a bill of attainder, an *ex post facto* law, a violation of due process of law, and an infringement upon freedom of speech (R. 3-23).

A hearing on the Petition was held in District Court on April 10, 1958. On April 14, 1958, the Court entered an Order dismissing the Complaint and discharging the Writ of Habeas Corpus theretofore issued (R. 46, 35). A Notice of Appeal was filed the same day (R. 36). The Trial Court refused to restrain the Government from deporting Petitioner pending the outcome of the appeal, nor would it enlarge him on bail (R. 81, 86).

Application was made to this Court for a restraining order and enlargement on bail, which was granted April 22, 1958.

This appeal involves the following questions:

1) Whether Petitioner's alleged association with the Communist Party, on the record of this case, was "meaningful" and "political" within the rule of the Rowoldt case:

2) Whether the Act under which Petitioner has been ordered deported is unconstitutional.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to declare null and void the Order of Deportation issued by the Immigration and Naturalization Service, because the alleged membership of Petitioner in the Communist Party was not meaningful or political as defined in *Rowoldt v. Perfetto,* supra.

2. The District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, as amended by the Internal Security Act of 1950, now Section 1251 (a) (6) (c), U.S. Code.

ARGUMENT

The District Court erred in failing to hold null and void the order of deportation issued by the Immigration Service, because the evidence shows that the alleged membership of petitioner in the Communist Party was, if the Government's testimony be taken at face value, not a meaningful political association as required by the rule of Rowoldt v. Perfetto.

In *Galvan v. Press,* 347 U.S. 522, the Supreme Court stated the test to be applied in determining whether membership in the Communist Party had been established for the purpose of deportation:

> "There must be a substantial basis for finding that an alien committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization. . . .'" 347 U.S. @ 528.

Thereafter, the Board of Immigration Appeals considered any proof of membership in the Communist Party as sufficient to sustain an order of deportation. *Matter of G.,* File No. 4-524774. The Board deemed adequate for this purpose the testimony of paid witnesses that an alien had been seen at closed Communist meeting, and had been observed paying dues. No proof of politically-conscious acts was required as a basis for deportation. Rather, the motives and knowledge of Communism of an alien relative to his alleged membership in the Communist Party were considered wholly irrelevant. By such means was a harsh and primitive law made even more cruel in application.

But in *Rowoldt v. Perfetto,* 355 U.S. 115, the Supreme Court reiterated the test laid down in *Galvan* and indeed went somewhat further by requiring that an order of deportation be supported by "substantial" proof that an alien had a "meaningful association" not wholly devoid of "political implications."

It follows that if the record in this case contains as little proof of "meaningful association" with the Communist Party by appellant as did the record in *Rowoldt,* appellant is entitled to a judgment voiding the order of deportation. We therefore propose to compare in detail the evidence recited in the *Rowoldt* opinion with that given by government witnesses in the case at bar. However, we would have this Court bear in mind that of the testimony of the two government witnesses, one, Knipe, was discounted by the Board of Immigration Appeals because of the lack of veracity he displayed at

the hearing (Tr. 76 ff.), and the other, Wilmot, must also be considered unreliable because he drank to excess (Tr. 48-50). In addition, appellant testified that he was never a member of the Communist Party and was and is loyal to the United States (Tr. 198, 203, 204, 220; R. 54). On the other hand, Rowoldt's connections with Communism were admitted in his own testimony.

The testimony offered by the government in this case relative to the period of appellant's alleged membership in the Communist Party is not definitive, but it can be inferred that he was a member from 1936 to some time in 1939 (Tr. 14, 19). Rowoldt admitted being a member for about a year (355 U.S. 116-117; 128-129).

Rowoldt admitted, and there was government testimony that appellant attended Communist Party meetings and paid membership dues (Tr. 14, 15, 17, 19, 22, 25, 26, 67, 69; 355 U.S. 116-7). Rowoldt worked in a Communist Party bookstore in which Communist and Marxist literature was sold (355 U.S. 118, 120); appellant is supposed to have helped circulate the "Labor New Dealer", of which Wilmot was the editor, but which was published by the Congress of Industrial Organizations (Tr. 15, 19, 20).

Rowoldt demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution (355 U.S. 129-30). On the other hand, appellant was and apparently still is ignorant of Communist history and theory, even according to a government witness (Tr. 70, 75, 201, 202; R. 61, 62).

As for his reasons for joining the Communist Party, Rowoldt testified that they were his concern to improve economic conditions during the depression (355 U.S. 117-118). Appellant's motives for his alleged association with Communism were equally pure, even according to his accusers. Knipe testified that he was primarily concerned with problems of relief, unemployment and welfare—"bread-and-butter" issues, and that the political doctrine of overthrow by force and violence was never advocated by appellant (Tr. 72, 75).

With respect to possible leadership roles, there is no indication in the Rowoldt opinion that the alien participated as a leader. In the record in this case, the evidence of leadership is somewhat confused. Wilmot testified that appellant was possibly a "functionary" (Tr. 15) and that he was in the "top fraction" of the party (Tr. 27), without providing any definition of these terms. Knipe, however, denied that appellant was a "functionary" (Tr. 68) or that he held an office (Tr. 66, 68) other than in a passing reference to his being on the executive board of a branch (Tr. 68). There was no evidence that appellant performed any functions as a member of this board, or what such functions were supposed to be, or indeed, if he ever assumed the office knowingly. Moreover, the record is silent as to how long he may have been on this "board", how many others were members thereof, or as to any other information concerning it.

Nowhere in the record is there the slightest bit of evidence that appellant, if he was a Communist Party member, was aware or interested in its political, as dis-

tinct from economic or welfare, theories or activities.

The District Judge attempted to avoid the impact of the *Rowoldt* case by pointing out that Rowoldt admitted party membership and appellant did not (R. 77, 82). This is, however, a difference without a distinction; the question is not whether appellant admitted anything, but what evidence there is in the record which tends to prove that he had a meaningful association with Communism not wholly devoid of political significance. As this record lacks such evidence, the order of deportation against appellant should be declared null and void.

The Act Under Which the Government Seeks to Deport Appellant Is Unconstitutional

Not wishing to waive any constitutional rights, appellant reasserts his contention that Section 1251 (a) (6) (c), of Title 8, USC is unconstitutional because it violates the First Amendment which guarantees freedom of speech and association, the Fifth Amendment's provision for due process of law, and Article I, section 9(3) which prohibit bills of attainder and ex post facto laws.

In the interests of brevity, appellant will not restate his arguments on these points, but rather, he respectfully refers the Court to his briefs in the prior appeal, Niukkanen v. Boyd, No. 15061, and adopts by reference those portions of that brief dealing with the constitutional questions.

CONCLUSION

In the oral opinion of the District Court rendered April 14, 1958, it was remarked that "the law under which the Petitioner is being deported is a harsh one, but this is a matter for the legislative branch of the Government and is outside the power of the Court" (R. 85).

We would add, however, that the Courts are not impotent to block both abuses of administration and violations of the Constitution by Congress. In our form of government, the Courts are often the last hope of fairness. Here an alien who has resided among us peacefully and honorably, who served his country to the best of his ability in war, and against whom not one overt act of disloyalty or infidelity has ever been charged, much less proven, is under threat of deportation by a few relentless governmental officials who have singled out, for some unknown reason, this harmless person to receive the full brunt of a barbaric law.

The testimony adduced to justify this course of action comes from witnesses who hardly deserve the label "unimpeachable". But especially unfair is the imposition on appellant of a penalty for a political offense where, at most, his alleged association with Communism was motivated by a simple, human desire to gain better working conditions, unemployment compensation and relief for himself and others driven to despair by a vast economic depression.

Are the Courts indeed powerless to do justice on such a record? We think not, and therefore urge that the judgment be reversed, or at least, that a new administrative hearing be ordered. See *Schleich v. Butterfield,* 252 F.2d 191, 356 U.S. 971.

Respectfully submitted,

NELS PETERSON and
GERALD H. ROBINSON,
Counsel for Appellant.

APPENDIX

EXHIBIT NUMBER	OFFERED	ADMITTED
No. 1	(R. 66)	(R. 67)

15995

No. ~~15590~~

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

C. E. LUCKEY,
United States Attorney,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 9-8-58—40

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United States
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Appellant,

vs.

E. D. McALEXANDER, Acting District Director, Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

JURISDICTION

The jurisdiction of the District Court was invoked under Title 28 USCA, § 2241 and Title 5 USCA, § 1009. The jurisdiction of the Court of Appeals is invoked under Title 28 USCA, § 2253 and Title 28 USCA, § 1291.

STATEMENT

The appellant is an alien, having been born in Finland on November 24, 1908. He entered the United

States in 1909 and has resided in this country continuously since then. He registered under the Alien Registration Act.

On June 17, 1952, a warrant for the arrest and deportation of the appellant was issued by the District Director of the Immigration & Naturalization Service, which said warrant was served upon appellant on or about September 12, 1952. A hearing was thereafter held before Louis C. Hafferman, Special Inquiry Officer, which began on May 11, 1953 at Portland, Oregon and terminated on May 21, 1953.

On June 30, 1953, said special inquiry officer issued a written decision determining that the appellant was deportable for the reason that he had become a member of the Communist Party of the United States after entry into this country. The specific finding was that he had been a member of the Communist Party during the years 1937-1939. Said officer ordered appellant to be deported.

On April 2, 1953, appellant filed a timely notice of appeal to the Board of Immigration Appeals from the decision of the hearing officer.

On September 8, 1953, the Board of Immigration Appeals, after considering appellant's Points on Appeal, dismissed the same.

On November 11, 1954, appellant filed a motion to reopen the proceedings to enable him to apply for suspension of deportation. Appellant having been afforded the opportunity at the original hearing before the Im-

migration & Naturalization Service to apply for discretionary relief, which he did not do, and in the motion to reopen, appellant not having expressed a disavowal of membership in a subversive organization within the period of ten years last past, said motion was, on November 29, 1954, denied by the Board of Immigration Appeals.

On December 10, 1954, appellant again filed a motion to reopen the proceedings to enable him to make application for suspension of deportation, which said motion was granted by the Board of Immigration Appeals on December 23, 1954, and the warrant of deportation theretofore issued was withdrawn.

On February 2 and 3, 1955, the reopened hearing on appellant's application for suspension was held before a special inquiry officer in Portland, Oregon, who made and entered a written opinion on February 16, 1955 in which appellant's motion was denied.

On March 2, 1955, appellant appealed the decision of the special inquiry officer to the Board of Immigration Appeals.

On May 13, 1955, the Board of Immigration Appeals dismissed the appeal.

In the meantime and on December 13, 1954, appellant filed a Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the United States District Court for the District of Oregon, the same being numbered Civil 7833 in the court below. On January 30, 1956, an Amended Peti-

tion for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action was filed.

On February 21, 1956, trial was held in the United States District Court for the District of Oregon before The Honorable Gus J. Solomon, District Judge.

On March 2, 1956, Judge Solomon filed a written opinion and on March 6, 1956, ordered the Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief be dismissed and the writ of habeas corpus theretofore issued be discharged, and remanded appellant to the District Director, Immigration & Naturalization Service, to be held for deportation pursuant to the warrant and order of deportation previously issued.

On March 7, 1956, an appeal was taken to this court (*Niukkanen v. Boyd,* No. 15061), and thereafter, on February 8, 1957, this court sustained the decision of the court below by *per curiam* opinion (241 F.2d 938), stating specifically that it was for the reasons stated in the District Court's opinion reported in 148 F. Supp. 106.

A Petition for Writ of Certiorari to the Supreme Court of the United States was denied on December 16, 1957, 355 U.S. 905, 2 L.Ed. 2d 259.

On December 27, 1957, appellant filed a motion with the U. S. Immigration & Naturalization Service for an order requiring another hearing to be held, contending that the Supreme Court decision of December 9, 1957 in *Rowoldt v. Perfetto,* 355 U.S. 155, redefined the evidential and substantial requirements of membership

in the Communist Party as a basis of deportability and was such as to take appellant herein out of the class of deportable aliens. After careful reconsideration of the entire record the motion was denied by the Board of Immigration Appeals; the Board pointing out that appellant's petition for certiorari was denied eight days after the Supreme Court announced its decision in *Rowoldt*. Petitioner was notified by the District Director of the Immigration & Naturalization Service to surrender himself for deportation to Finland.

On April 4, 1958, appellant filed his present Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action (R. 3-23).*

On April 10, 1958, a trial was held in the court below on appellant's petition and complaint and on April 14, 1958, the court entered its order dismissing the complaint and discharging the writ of habeas corpus theretofore issued (R. 46, 35). A notice of appeal was filed on April 14, 1958 (R. 36, 37).

Appellant's Points on Appeal (R. 87, 88) vary from his statement of the questions involved as stated on Page 5 of appellant's brief, and the Specification of Errors (App. Br. 6). Appellant has apparently abandoned Paragraphs 2 and 3 of his Points on Appeal. Since said points were not included in appellant's Specification of Errors and no reference thereto having been

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* In this brief, "(R.....)" refers to the printed record of the proceedings in the U. S. District Court, and "(Tr.....)" refers to Exhibit 1, and typewritten transcript of the hearings before the Immigation and Naturalization Service.

made in appellant's brief, he must have considered them to be without merit and no further reference will be made thereto by appellee.

SPECIFICATION OF ERROR NO. 1

Appellant states that the District Court erred in failing to declare null and void the order of deportation issued by the Immigration & Naturalization Service, because "the alleged membership of Petitioner in the Communist Party was not meaningful or political as defined in *Rowoldt v. Perfetto,* supra."

SUMMARY

At the hearings before a special inquiry officer in May 1953, two former members of the Communist Party, Walter Wilmot and Lee Knipe, testified that they knew petitioner as a member of the Communist Party from 1937 to 1939, and had seen him at closed party meetings (Tr. 12-17, 26, 27, 65-67).

Walter Wilmot, who had been editor of the *Labor New Dealer* in Oregon from 1937 until his expulsion from the Party in 1939 and had attended meetings of many branches of the Party in that capacity (Tr. 13-15, 30), testified that appellant belonged to the Albina Branch and was in the "top fraction" of the Party (Tr. 27) and that he was present at a high-level meeting in Aberdeen, Washington, which was attended by appellant; that this meeting was called a "plenum" where reports were made as to the work carried on in the

Northwest (Tr. 19) and that those party members attending this plenum were the "annointed" people and all members attending were known in advance by the credentials committee (Tr. 27).

Knipe testified that appellant took an active part in meetings of the Albina Branch of the Communist Party and that he was on the executive board of the branch, although he did not hold office (Tr. 66-68). He testified further that he had attended at least 30 to 35 closed Communist Party meetings at which appellant was present, and at the meetings appellant took quite an active part in the discussions (Tr. 67). At another point in his testimony, the witness was asked the question, "At how many meetings did you see Mr. Mackie?" and the witness answered, "He attended regular each week. I would say from about a year and a half at least. A year and a half." (Tr. 93). He testified that as educational director, he taught members of that group the works of the Soviet Union (Tr. 93). The witness was further asked, "Now is your testimony in this hearing based on any animosity towards Mr. Mackie?" and the witness answered, "None whatsoever. We were very close friends." (Tr. 73).

At the 1953 deportation hearings, appellant was given the opportunity to refute the testimony of these two witnesses and to explain his participation, if any. He refused to accept this invitation, even though he was warned of the consequences of his failure to testify.

Although appellant had not applied for suspension of deportation during the 1953 hearings, the proceedings

were reopened, on his motion, to permit him to apply for such relief. At hearings held in February 1955, appellant testified that in 1937 and 1938, he belonged to a federation for the unemployed, which probably was the Workers Alliance (Tr. 195, 196). He denied that he had ever seen Wilmot (Tr. 200). He testified that he knew Knipe, but did not know whether Knipe was identified as an officer of a particular organization; and that he saw Knipe at dances and meetings of the unemployed council or Workers Alliance (Tr. 199, 200). When asked by his attorney if he ever attended Communist Party meetings, appellant answered (Tr. 200):

> "Well, if I said yes and if I said no maybe I wouldn't be telling the truth, because I really couldn't tell one way or the other. I went to meetings there. Sometimes maybe they were communist and maybe they wasn't. It could have been and maybe they wasn't."

He later testified that he had never knowingly been a member of the Communist Party of the United States (Tr. 204).

The special inquiry officer recommended that suspension of deportation be denied (Tr. 6a-11a). He pointed out that the alien was "evasive as to his activities during the period between 1930 and 1940, particularly as to whether or not he had been a member of the communist party". (Tr. 8a). He found that "the alien's testimony that he does not recall or denial of membership in the communist party is not credible" (Tr. 10a-11a). The Board of Immigration Appeals affirmed (Tr. 1a-4a), finding that appellant "failed to submit any evidence showing that he is actively opposed to the

doctrines and teachings of the communist party", and that while there was clear evidence that appellant had been a member of the Party from 1937 to 1939, there was no proof of complete disassociation (Tr. 4a).

The court below (R. 77, 78) stated with clarity why he felt that the *Rowoldt* decision could not be determinative of the facts applicable to the present case. After commenting about the witness Knipe, the court stated in part as follows:

> "As far as the other testimony is concerned, if the testimony is to be believed—and the board apparently believed it—this man went to meetings over a period of a year and a half regularly. He attended weekly meetings. He worked at the bookstore even though he didn't get any money. He met at the Labor New Dealer back office. He went to Aberdeen where there was a district director of the communist party. Rappaport was there on a high-level meeting. He was not a plain ordinary member, according to the testimony, but he was a man who was on the executive board. Now that is a lot different than Rowoldt. It does not make any difference whether he denies it or not; that is what the administrative board held, and just because he denies it, you cannot say that this is a better case than Rowoldt. The fact is that there is much more in this record than that in the Rowoldt case.
>
> . . . . .
>
> "Perhaps I should make it clear that I not only think there was evidence in the record to sustain the findings that way, but I believe that the testimony is true. I believe the testimony of Bob Wilmot, and I believe the testimony of Knipe, and I do not believe Mr. Mackie's testimony. I believe that he perjured himself before, and I believe that he perjured himself today because I think that the evidence is clear that he was a member of the com-

> munist party during the period in which it is said that he was a member."

The court further stated (R. 81):

> " . . . . . I am convinced that petitioner does not come within the reach of the Rowoldt decision."

ARGUMENT

There was sufficient probative evidence at the deportation hearings to support the finding that appellant was a knowing member of the Communist Party from 1937 to 1939. Issues of credibility were for the trier of fact. As the Board of Immigration Appeals noted in its original decision, even if the testimony of the witness Knipe is not credited (although the testimony as to his prior conviction of forgery does not require that his whole testimony be discredited), the testimony of the witness Wilmot was not shaken. That evidence was to the effect that petitioner was a card-carrying, dues-paying, "annointed" member of the party, one of the "top fraction" of his branch. Under these circumstances, appellant cannot be said to have been merely a nominal member within the exception noted by the Supreme Court in *Galvan v. Press,* 347 U.S. 522 @ Page 528, where the test to be applied in determining whether membership in the Communist Party had been established for the purpose of deportation (misquoted by appellant, Page 6 of his brief):

> " . . . . . it is enough that the alien joined the party, aware that he was joining an organization known as the communist party which operates as a distinct and active political organization, and that he did so of his own free will."

The factual situation in this case is almost identical to that in the case of *Schleich v. Butterfield,* 6 Cir. 1958, 252 F.2d 191, in which case the court considered whether the evidence was sufficient to establish the "meaningful association" with the Party as determined in the *Rowoldt* case. The court said in part as follows:

> "Rowoldt v. Perfetto did not change the law with respect to the proof necessary to show membership in the communist party. Galvan v. Press was recognized as the controlling authority. The different ruling was the result of different factual situations. The court closed its opinion in the Rowoldt case by saying, 'The differences on the facts between Galvan v. Press, supra and this case are too obvious to be detailed.' "

Schleich did not testify in the hearing or introduce any evidence to show that his relationship to the party was merely nominal rather than substantial. The court further said:

> "Certainly, there is nothing in the record to show that he did not join the party of his own free will or that he was mistaken about the nature and purposes of the party at the time of joining and thereafter. His years of membership and active participation in organization work compel the opposite conclusion."

Continuing, the court said:

> "In our opinion, the foregoing evidence was sufficient to establish the 'meaningful association' with the party, referred to in the Rowoldt case, and to show that Schleich joined the party, aware that he was joining an organization known as the communist party which operated as a distinct and political organization and that he did so of his own free will, which according the rule laid down in Galvan v. Press, supra, 347 U.S. 522, 528, 74 S.Ct.

> 737, 98 L.Ed. 911, was enough to constitute him a 'member' within the terms of the act."

See also, *Wellman v. Butterfield,* 6 Cir. 4/9/58, 253 F.2d 932.

The *Rowoldt* case is not in point because in that case the petitioner at the time of his arrest admitted that he had been a member of the communist party for a short time, but stated that his reasons for joining were economic, to get food, shelter and clothing. Rowoldt's testimony, which was uncontroverted, overcame the normal inference that one who joins and remains a member of a political organization knows the nature and purposes of that organization. The Supreme Court found that Rowoldt had had no meaningful association with the communist party.

In the present case, there is abundant and convincing evidence that the appellant was a member of the communist party for at least two years, was on the executive board of his branch; was a member of the "top fraction" of the local communist organization; was one of the "annointed" members attending a high-level conference at Aberdeen, Washington; and was regularly present at weekly meetings for a period of at least one year and a half, at which meetings the educational director taught the membership "the works of the Soviet Union". It is reasonable, therefore, to conclude from this evidence that appellant was fully aware of the political nature of the organization of which he was an active member.

Further, appellant's silence at the first deportation

hearing and the fact that he declined to offer any evidence to refute and contradict the very damaging testimony of the government's two witnesses entitled the immigration officer and the trial judge to draw an inference that appellant's association with the Communist Party was a "meaningful association" and that he was joining the organization knowing that it operated as a distinct and active political organization, and that he did so of his own free will. *See Ocon v. Guercio,* 237 F.2d 177, 181, and cases therein cited.

SPECIFICATION OF ERROR NO. 2

Appellant states that the District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, as amended by the Internal Security Act of 1950.

ARGUMENT

Harisiades v. Shaughnessy, 342 U.S. 580 and *Galvan v. Press* fully decide the questions of constitutionality which are here raised by appellant. Further in this connection, these identical questions were raised in appellant's form appeal (Case No. 15061) supra. See also this court's decision of *Ocon v. Guercio, supra.*

CONCLUSION

Judgment of the District Court dismissing the Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief, discharging the writ of habeas corpus and remanding the appellant to the custody of the District Director of the Immigration & Naturalization Service for deportation should be in all things affirmed.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney
District of Oregon.
VICTOR E. HARR,
Assistant U. S. Attorney.
Of Attorneys for Appellee.

No. 15992

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE BRUNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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IN THE

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FOR THE NINTH CIRCUIT

JOE BRUNO,

Appellant,

vs.

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Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

The Government accepts the Statement of Jurisdiction as presented by the appellant.

II.

STATEMENT OF THE CASE.

A. Factual Statement.

On October 10, 1957 appellant's co-defendant, Cellino, was contacted by Los Angeles County Deputy Sheriff Ray Velasquez, acting as an undercover agent, through one Bobby Ulrey [R. T. 35]. Ulrey said he would like to "pick up," *i.e.*, obtain some heroin [R. T. 35]. Co-defendant Cellino said "he did not have any stuff but he would take us to the man that did" [R. T. 35, lines 12-

13]. These three individuals then drove to Narva and Mission Streets in Los Angeles at Cellino's direction where the latter told the others to wait, and left them [R. T. 35]. Two or three minutes later appellant Bruno came to the car where Velasquez and Ulrey were waiting and said, "How much do you guys want to pick up?" [R. T. 35]. Velasquez said that he wanted an ounce of heroin and immediately the appellant and Velasquez negotiated the price of the sale [R. T. 36-37]. Furtive arrangements were then made for delivery of the narcotics [R. T. 37]. Arrangements were also made for a further transaction between appellant and Velasquez [R. T. 37-38]. A conversation ensued between them regarding how much the particular narcotics could be cut (diluted) and regarding their quality [R. T. 39]. Velasquez paid appellant $100 in federal advance funds, and further machinations followed resulting in the first delivery of narcotics by appellant to Velasquez [R. T. 40-42, Ex. 1].

On October 14, 1957 a second purchase was made by Velasquez from appellant [R. T. 44-46]. Again appellant advised Velasquez as to how to cut the narcotics [R. T. 45-46]. Although the price quoted by appellant for this transaction was $400 [R. T. 44], appellant agreed to modify it to $380 upon negotiation [R. T. 45]. Again appellant personally delivered the narcotics to Velasquez and received the $380 of federal advance funds [R. T. 46, Ex. 2].

On October 23, 1957 Velasquez again met appellant [R. T. 49]. Appellant suggested that the site of negotiations was "too hot" and that he and Velasquez should go elsewhere [R. T. 49]. The negotiations were carried out and another transaction for heroin was consummated [R. T. 50-52, Ex. 3]. Again appellant advised Velasquez

regarding "cutting" of the narcotics [R. T. 51]. On the same occasion appellant indicated that he was always ready to deal in heroin [R. T. 53, lines 16-17].

On November 24, 1957 Velasquez and appellant entered into their fourth dope transaction [R. T. 55-59, Ex. 4]. The transaction was concluded in a secretive manner [R. T. 55-59].

The jury convicted appellant Bruno on all four transactions [C. T. 53].

B. Procedural Statement.

The Indictment charged in each of four counts that appellant sold and facilitated the sale of a quantity of heroin on different dates [C. T. 2-3].

Local Civil Rule 14(a) of the United States District Court for the Southern District of California, incorporated in the Federal Criminal Rules for that District by Rule 1 of the District's Rules of Criminal Procedure, provides:

> "Rule 14. Instructions to Jury.
>
> "(a) Requests for Instructions and Objections Thereto:
>
> "If the case is a jury trial, proposed instructions in writing for the jury, together with citations of authority for each instruction, shall be presented to the court in duplicate as soon as possible after the opening of the trial, but the court in its discretion may at any time prior to the opening of argument to the jury receive additional such requests. Each separate request shall be numbered, shall indicate which party presents it, and shall embrace but one subject and the principle of law embraced in any requested instruction shall not be repeated in subsequent requests.

> "Copies of requested instructions shall be served forthwith upon the adverse party. The adverse party shall, within such time as the court may allow, specify objections in writing (or orally if permitted by the court) to any of said instructions. Such objections shall be numbered and shall specify distinctly the matter to which said adverse party objects, and said objections shall be accompanied by citations of authority in support thereof."

Appellant failed to present his proposed jury instructions on the opening day of trial, February 18, 1958, as required by the foregoing rule. They were filed on the afternoon of February 19, 1958 [C. T. 16].

Appellant's motion for acquittal at the end of the Government's case was denied [R. T. 138, 151; C. T. 16]. Such motion was not renewed at the end of all the evidence [R. T. 194; C. T. 16-17].

On February 20, 1958 the court, out of the presence of the jury, read its proposed instruction on entrapment and asked appellant whether he desired such instruction to be given. The appellant said "no" [C. T. 51; R. T. 196-199].

The only objection made by appellant to the instruction as given was the refusal by the court to give appellant's proposed Instruction No. 3, bearing on his contention that he was only an agent and therefore not criminally responsible in the transaction [R. T. 216; C. T. 51].

The court's instructions [R. T. 202-215; C. T. 31-50] covered, among other matters, the elements of the offense

[R. T. 212], the inferences that the statute expressly provides with reference to the importation of narcotics and appellant's knowledge thereof [R. T. 213-214], and the manner by which appellant could overcome such inferences [R. T. 213].

III.
SUMMARY OF ARGUMENT.

A. *The evidence did not establish the principal-agent relationship contended for by appellant.*

1. There were sufficient facts to establish a buyer-seller relationship between appellant and undercover Agent Velasquez, but not a principal-agent relationship.

2. Assuming, *arguendo*, that appellant was selling for another, he facilitated the sale of heroin, and the conviction must be sustained on that ground.

3. Appellant's proposed Instruction No. 3 [C. T. 29] was properly refused since it (a) was not filed within the time required by the court rules, and (b) because it does not represent the law in this Circuit.

B. *The statutory presumption is valid and was properly presented with the other facts to the jury for its ultimate determination.*

C. *An undercover agent may properly afford one engaged in the narcotics traffic (as here) the opportunity to commit a felony. The defense of entrapment is unavailable in such circumstance.*

IV.
ARGUMENT.

A. The Evidence Did Not Establish the Principal-Agent Relationship Contended for by Appellant.

1. There were sufficient facts to establish a buyer-seller relationship between appellant and undercover Agent Velasquez, but not a principal-agent relationship.

2. Assuming, *arguendo,* that appellant was selling for another, he facilitated the sale of heroin, and the conviction must be sustained on that ground.

3. Appellant's proposed Instruction No. 3 [C. T. 29] was properly refused since it (a) was not filed within the time required by the court rules, and (b) because it does not represent the law in this Circuit.

A reading of the evidence, particularly the portions highlighted in appellee's Statement of the Case, should be sufficient to establish appellant as the seller of narcotics to Velasquez. Appellant made all the price negotiations, personally made the deliveries, and personally accepted the federal advance funds which were paid to consummate each transaction. Appellant indicated his participation in and knowledge of dope traffic by discussing with Velasquez how to "cut" the heroin appellant was selling. He knew the quality of his product. Furthermore, the furtive and secret arrangements which were made in connection with the sales are evidence that the appellant was not acting as an innocent agent.

It may be true that appellant obtained his narcotics from another. This fact, if true, does not necessarily negate the existence of a seller-buyer relationship or

established an agency. Appellant did not testify, which is his privilege, but would have us assume that he was a mere conduit without offering any evidence to that effect. A search of the record indicates the absence of such evidence. It is common knowledge that narcotics generally changes hands several times before it reaches the ultimate consumer. Taking the evidence at its face value, there is no other rational conclusion on the facts of this case except that appellant was acting as a seller.

Appellant's argument, based on the conjunctive nature of Indictment, indicates his misunderstanding of federal criminal pleading (App. Br. p. 10).

Where a statute specifies several ways or means in which an offense may be committed in the alternative, it is bad pleading to allege such means in the alternative, the proper way being to connect the various allegations in the indictment with the conjunctive term "and" and not with the word "or."

Crain v. United States, 162 U. S. 625, 636;

Fredrick v. United States, 163 F. 2d 536, 544 (9 Cir., 1947), cert. den. 332 U. S. 775;

Price v. United States, 150 F. 2d 283 (5 Cir. 1945), cert. den. 326 U. S. 789;

Mellor v. United States, 160 F. 2d 757, 761 (8 Cir., 1947);

District of Columbia v. Hunt, 163 F. 2d 833 (D. C. Cir., 1947);

Heflin v. United States, 223 F. 2d 371, 373 (5 Cir., 1955).

In the *Mellor* case, *supra*, the following language appears at page 671:

> ". . . if the statute denounces several things as a crime, the different things thus enumerated in the statute being connected by the disjunctive 'or,' the pleader *must* connect them by the conjunctive 'and' before evidence can be admitted as to more than one act. To recite that the defendant did the one thing 'or' another makes the indictment bad for uncertainty. To charge the one thing 'and' another does not render the indictment bad for duplicity and a conviction follows if the testimony shows the defendant to be guilty of either the one *or* the other thing charged."

Proof of any one of the acts joined in an indictment in the conjunctive is sufficient to support a verdict of guilty where the statute groups several related offenses in the disjunctive.

Crain v. United States, supra;

Fredrick v. United States, supra;

Price v. United States, supra;

Mellor v. United States, supra;

Heflin v. United States, supra.

It is the statute which determines what is the crime. Thus, the instant conviction can be maintained if it is sustainable either as a sale or as a facilitation of a sale (Title 21, U. S. C., §174). Assuming, *arguendo,* that appellant was acting on behalf of another, he nevertheless facilitated the sale. The facts are not capable of the construction that Velasquez wanted appellant to go out to some other person acting as a mere conduit, and purchase heroin from him.

The appellant's requested Instruction No. 3 [C. T. 29] would have served to confuse the jury unnecessarily since it was not based upon any evidence in the case.

The cases cited by appellant in support of his proffered instruction do not help him. *United States v. Sawyer,* 210 F. 2d 169 (3 Cir., 1954), is far different factually as indicated by the following quotation from page 170:

> "There was evidence that defendant and a companion were walking along a Wilmington street at about 5:30 p. m. on their way home from the plant where they both were employed. They passed a parked automobile in which a stranger sat talking to an acquaintance of theirs who was standing on the sidewalk. The stranger called Sawyer over to the car and asked 'Can you get me some horse,' the word 'horse' being a slang expression for heroin. Sawyer remonstrated that he had a job and was not doing that sort of thing. The stranger repeated his request urging that he was 'sick.' But Sawyer and his companion left him and continued on their way. After they had walked a short distance the same two men intercepted them again. This time the stranger feigned a dramatic and violent seizure and begged Sawyer to get him something to relieve his distress. Sawyer, moved by this apparent suffering and knowing where heroin could be purchased, took twenty dollars as then proffered, went to a nearby hotel, purchased some heroin for twenty dollars and brought it back and gave it to the stranger. . . ."

None of these factual elements is present in the instant case as indicated by the fact statements in this and in appellant's brief.

In *Adams v. United States,* 220 F. 2d 297 (5 Cir., 1955), also relied on by the appellant, there is no indica-

tion that the indictment charged facilitation. The defendant there was charged with a sale, but she testified in her own behalf, and this testimony, together with all of the other facts, was consistent with the conclusion that she acted as a procuring agent, not as a seller. On the facts of that case it is clear that defendant did facilitate a sale, and unquestionably a conviction on such charge would have been upheld if the indictment had alleged such offense. Thus, the *Adams* case is not authority for appellant here who is charged with both facilitation and sale.

Appellant states (App. Br. p. 13) that "there is admittedly a conflict over the status of the appellant." We do not concede this conclusion since the facts here are only consistent with the jury's finding of appellant's position as a seller.

Appellant's attempt to place himself in the position of agent for Velasquez by relying on such factors as the failure of appellant to have the narcotics in his immediate possession, the delay of arrest of appellant for the purpose of trying to identify his supplier, if any, the fact that Velasquez did not know of a particular supplier for appellant, etc., is a naive, if unconvincing approach. It ignores completely the exigencies of this illicit traffic and the necessities in the Government's attempt to eliminate this evil.

The argument of appellant beginning at page 14, line 22, and continuing to page 16, line 10, of his Opening Brief, in which he relies on *United States v. Moses,* 220 F. 2d 166 (3 Cir., 1955), is extremely confusing. Close reading of that case indicates that the defendant was indicted as a *seller* of heroin while the facts showed that she *acted for the buyers,* a separate crime under the statute.

At page 168 of that opinion the following language appears:

> "There is no evidence that appellant's relationship to Cooper's illicit business was other than that of a customer. On the day in question she merely introduced the prospective buyers to Cooper and vouched for them, all at the buyers' request, with the result that the principals accomplished a sale some hours later. On these facts the district court, sitting without a jury, found the defendant guilty as charged.
>
> "* * *
>
> "The government has chosen to indict Marie Moses for her connection with the crime of selling rather than for any connection with buying. The conviction must stand, if at all, on her relation to the seller and his illicit enterprise. Any relation to the buyer actually militates against conviction of the charged offense of criminal complicity in selling.
>
> "The undisputed facts show the appellant acting solely at the behest of the prospective buyers and in their interest. At the buyers' request she did two things to facilitate their purchase. She introduced them to the seller and she vouched for their *bona fides*, if purchasers of contraband drugs can be so characterized. That is all that was proved. There was nothing to show that she was associated in any way with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller. For this reason the conviction cannot be sustained."

Appellant here fails to distinguish between aiding and abetting a *buyer* as occurred in the *Moses* case, and

facilitating a *sale* as was charged and proved in the instant case.

Finally, appellant is not in a position to complain of the court's refusal to give his instruction. It is obvious from a reading of the transcript that this was his basic defense from the very beginning of the trial, yet the instruction was not submitted in time as required by Local Rule 14(a) although it was prepared before trial [R. T. 200, line 19].

B. The Statutory Presumption Is Valid and Was Properly Presented With the Other Facts to the Jury for Its Ultimate Determination.

The statutory presumption that heroin was illegally imported and that defendant knew this fact has been sustained many times.

Hooper v. United States, 16 F. 2d 868, 869 (C. C. A. 9, 1926);

Stopelli v. United States, 183 F. 2d 391 (C. C. A. 9, 1950), cert. den. 340 U. S. 864;

United States v. Moe Liss, 105 F. 2d 144, 146 (C. C. A. 2, 1939);

United States v. Feinberg, 123 F. 2d 425 (C. C. A. 7, 1941), cert. den. 315 U. S. 801;

Howard v. United States, 75 F. 2d 562 (C. C. A. 7, 1935);

Frank v. United States, 37 F. 2d 77, 79, 80 (C. C. A. 8, 1929);

21 U. S. C. §174.

This Court has recently considered the matter once again, and in light of the *Tot* case (*Tot v. United States,* 319 U. S. 463) cited by appellant (App. Br. p. 17), in *Caudillo v. United States,* 253 F. 2d 513 (9 Cir., 1958). In the *Caudillo* case the Court once again upheld the constitutionality of the presumption, notwithstanding an attack which is similar to that advanced here by appellant, *i.e.,* that there is no rational connection between the facts proved and the ultimate fact presumed, and that the statute casts an unfair and practically impossible burden on the defendant. This Honorable Court pointed out in *Caudillo* that the *Tot* case provided no precedent for a narcotics type case, which is factually very different from a case involving possession of a firearm. While the appellant contends that there is no rational basis for the application of the presumption, this Court has not agreed with him, nor has the Supreme Court of the United States.

Yee Hem v. United States, 268 U. S. 178.

The elements of the offense with which appellant was charged, the statutory presumption, and a statement of the manner in which such inference could be overcome were all discussed by the court in its charge to the jury [R. T. 212-214]. The jury made the ultimate determination as one of fact and contrary to appellant's contentions on each of the four counts with which he was charged.

Since appellant failed to dispel the inference by contrary evidence to the jury's satisfaction, as required by the statute, he is not now in a position to complain.

Appellant suggests under this heading that there was error in denying his motion for acquittal. This Court has many times held that a motion for judgment of acquittal, even though made at the end of the prosecu-

tion's evidence, must be renewed at the end of all the evidence or it is waived.

Mosca v. United States, 174 F. 2d 448, 450-451 (9 Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1 Cir., 1950).

(As to the necessity of making a motion for acquittal at the close of all evidence.)

United States v. Powell, 155 F. 2d 184 (7 Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8 Cir., 1951).

C. An Undercover Agent May Properly Afford One Engaged in the Narcotics Traffic (as Here) the Opportunity to Commit a Felony. The Defense of Entrapment Is Unavailable in Such Circumstance.

Appellant's final point hopefully suggests the defense of entrapment. He is hardly in a position to argue this point, having waived it in the trial court [R. T. 199]. There the court offered to instruct the jury on the law as to entrapment and the appellant rejected the court's instruction. Although he would not submit this question to the jury, he now has the temerity to suggest that this Court should upset the jury's determination on that ground. He states with some candor, at page 21 of his Opening Brief: "Admittedly, most of the presently existing opinions weigh heavily against the availability of the defense of entrapment in this case." It is obvious that appellant was hoping for a change in the law of entrapment in the *Sherman* and *Masciale* cases, which were

pending in the United States Supreme Court when his brief was written. Unfortunately for appellant the Supreme Court has now rendered its decision in both cases on May 19, 1958. At this writing they are reported only in 26 Law Week 4334 (*Sherman*) and 26 Law Week 4339 (*Masciale*), but the court did not make any change in the existing law. It affirmed the principles as set forth in *Sorrells v. United States,* 287 U. S. 435.

The *Sherman* case resulted in a reversal of the conviction on the ground of entrapment. However, therein the court stated:

> "In *Sorrells v. United States,* 287 U. S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision.
>
> "* * *
>
> "However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. See 287 U. S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

In the instant case on the uncontradicted facts we obviously have only a trap for an unwary criminal.

In the *Sherman* case there are peculiar facts in which an addict (appellant there) was importuned by another addict to help obtain some narcotics while attempting to "kick" the habit. The latter wanted the narcotics to ease

the process since he was not responding to the treatment which both addicts were taking. There were repeated requests over a period of time made to the appellant for a "source." Finally, the appellant there succumbed and both addicts shared the narcotics obtained on several occasions. Then the other addict informed to the Bureau of Narcotics and several subsequent transactions were observed by agents, resulting in the conviction in that case. The issue of entrapment was presented to the jury. The Supreme Court held, under those circumstances, that there was entrapment as a matter of law, and the conviction was reversed. The facts in the instant situation are far removed. Basically, there was no importuning, and many other factual differences are likewise apparent.

A reading of the *Masciale* case, decided the same day, and in which the conviction was affirmed despite an entrapment defense, indicates that the law remains unchanged. Of particular significance is this statement of Chief Justice Warren who wrote the opinions in both the *Sherman* and *Masciale* cases:

> "It is noteworthy that nowhere in his testimony did petitioner state that during the conversation either Marshall or Kowell tried to persuade him to enter the narcotics traffic."

Also significant is the following:

> "While petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him in regard to Kowell and so find for the Government on the issue of guilt."

In the instant case appellant did not testify; he waived the entrapment instruction; yet he now presents this defense as a basis for reversal before this Honorable Court. Nothing more need be said in that regard.

V.
CONCLUSION.

(1) It is clear that the appellant held himself out to be a seller of narcotics in this case. He also facilitated the sale of narcotics on behalf of some unknown supplier. (2) No evidence was before the trier of fact negating the statutory presumption that appellant knew the narcotics were illegally imported. (3) Finally, the defense of entrapment was waived by the appellant when he stated to the court that he did not want the standard instruction on entrapment given to the jury. He is not now in a position to complain. Therefore, the Government respectfully requests that the judgment of conviction of the trial court be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
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Chief, Criminal Division,

Attorneys for Appellee.

No. 16004

See Vol. 3073

United States Court of Appeals

for the Ninth Circuit

THE IDAHO FIRST NATIONAL BANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-13-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the District of Idaho, Southern Division

Civil No. 3269

THE IDAHO FIRST NATIONAL BANK,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains of defendant, and for cause of action, alleges and avers as follows to wit:

I.

During all times mentioned herein plaintiff was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business in the City of Boise, Idaho. Plaintiff is a resident of the above-entitled judicial district.

II.

Jurisdiction herein is based upon Title 28 United States Code Sections 1346(a), 1348 and 1402(a).

III.

This is an action arising under the Internal Revenue Laws of the United States, more particularly Title 26, U.S.C.A., Section 41 (1939), Section 22 (1939), Section 6901(a)(1)(A)(1) (1954)

(prior law Section 311 (1939)), Section 6402(a) (1954) (prior law Section 322 (1939), Section 115 (c) (1939), Section 112(b)(6) (1939), Internal Revenue Income Tax Regulations 118, Sections 39.22 (a)20 and 39.115(a)2.

IV.

That prior to the 10th day of May, 1952, the Wendell National Bank, a corporation, was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business at Wendell, Idaho, within the above-entitled judicial district.

V.

That on the 10th day of May, 1952, plaintiff purchased the entire capital stock of the Wendell National Bank, Wendell, Idaho, for the sole purpose of acquiring the assets of said bank.

VI.

That on the 10th day of May, 1952, immediately after the purchase of the Wendell National Bank stock by plaintiff, a special meeting of the stockholders of said Wendell National Bank, was held, and by resolution, duly and regularly passed by a vote of one hundred per cent of the total capital stock of said corporation the Wendell National Bank was voluntarily dissolved and E. R. Jones, Vice President of plaintiff corporation, was appointed liquidating agent, for the purpose of winding up the affairs of said corporation.

VII.

That thereafter on the 10th day of May, 1952, E. R. Jones, acting in his capacity as liquidating agent of said corporation made and executed the necessary transfers, assignment and sale of all assets and liabilities of said Wendell National Bank, both real and personal, to plaintiff in exchange for the Wendell National Bank capital stock owned by plaintiff.

VIII.

That immediately thereafter, and on the same day, said instrument was delivered to plaintiff the sole stockholder of record and conveyed to said plaintiff in kind all real estate and personal property owned by said Wendell National Bank and from and after May 10th, 1952, said Wendell National Bank owned no property either real or personal, whatsoever, and realized no income thereafter and for all intent and purposes was fully liquidated.

IX.

That said Wendell National Bank is in the general banking business and at all times prior to its ceasing business and liquidation consistently reported its income by using "cash basis" method of accounting.

X.

That on the 19th day of June, 1952, a corporation income return was filed for said Wendell National Bank, for the period from January 1st, 1952, to May 10th, 1952, by plaintiff. In said re-

turn plaintiff erroneously included as taxable income interest not due or collectible in the sum of $10,843.55. That plaintiff did on the 19th day of June, 1952, and the 30th day of June, 1952, pay to the Collector of Internal Revenue for the District of Idaho, the corporation income tax in the amount of $5,577.61 and $242.51, respectively, based upon said income as reported on said tax return. Photostat copy of corporation return prepared by the office of Director of Internal Revenue is attached hereto and marked Exhibit "A."

XI.

That the interest on unmatured notes receivable were not due or demandable or collectible until the note matured, said interest being in the nature of a property right before it is due. Only a few notes were matured and delinquent. The interest was calculated at the time of liquidation in order to determine the value of the asset for liquidation purposes by computing the accrued interest on each note or bond from the date of the instrument to the date of liquidation. The amount of accrued interest was placed in pencil notation on each note. The interest was then totalled and the adding machine tape was saved and made a part of plaintiff's records.

XII.

That subsequently on or about November 18, 1954, the Commissioner of Internal Revenue through his delegate examined the final corporation income tax return of the Wendell National Bank for the period

from January 1st, 1952, to May 10, 1952. The revenue agent's report dated November 18, 1954, eliminated the erroneously accrued but not due or collectible interest in the amount of $10,843.55, from income giving the following reason: "The Wendell National Bank has always kept records and filed returns on the cash basis. Just prior to distribution of the assets of Wendell National Bank to the Idaho First National Bank on May 10, 1952, accrued interest was set up in Wendell records and return by means of a debit to the assets receivable and credit to taxable income. Although the interest had accrued it was not payable. The accrued interest does not represent taxable income to the Wendell National Bank on cash basis of computing income and is therefore eliminated."

The elimination of interest from income in the amount of $10,843.55, resulted in an overassessment of $3,253.07, which was scheduled for refund on February 18, 1955, and the refund of that amount plus interest was received by plaintiff on or about March 15, 1955.

XIII.

That the examining officer correctly interpreted the law and regulations when he excluded the not due or collectible interest for the reason that "no gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may appreciated or depreciated in value since their acquisition."

XIV.

That thereafter on or about October 4, 1955, the Commissioner of Internal Revenue through his delegate re-examined the Wendell National Bank final corporation income tax return for the period from January 1st, 1952, to May 10, 1952.

XV.

That on or about October 4, 1955, the Commissioner of Internal Revenue issued the thirty day letter (bureau symbols A:R:JRC:30d:mjt) proposing to assess against plaintiff the amount of $3,-253.07, plus interest as provided by law, constituting plaintiff liability as transferee of the assets of the Wendell National Bank, Wendell, Idaho, for income taxes due for the period ended May 10, 1952. In the report attached to said thirty day letter the accrued but not due or collectible interest in the amount of $10,843.55, was included as income and the Commissioner in his reason for including said interest as income referred to revenue ruling 255, Cumulative Bulletin 1953-2,10. He further stated "The substance of the above ruling and the cited cases is that where the taxpayer liquidating corporation has performed substantially all the services necessary to establish its right to the income, the Commissioner is within his rights under Section 41 to change the method of determining income to include such items, Section 22(a)(20) relating to the gross income of corporations in liquidation not withstanding. In view of the foregoing, it is held that interest accrued at May 10, 1952, in the amount of

$10,843.55, is taxable to the liquidating corporation, the Wendell National Bank and adjustment is made accordingly."

Plaintiff did not accept the findings of the Commissioner and on December 12, 1955, filed a protest.

XVI.

That on February 3, 1956, a conference was held on said protest with a member of the Commissioner's appellate staff. No agreement was reached. However the Commissioner determined that the amount of interest in question was $13,191.19, instead of $10,843.55.

XVII.

That on April 6, 1956, the Commissioner of Internal Revenue issued a deficiency notice to plaintiff stating that the deficiency of $3,957.36, plus interest as provided by law constituted the liability as transferee of assets of the Wendell National Bank, and would be assessed. Said deficiency gave plaintiff ninety days in which to file a petition with the Tax Court of the United States, at its principal address in Washington 4, D. C., for a redetermination of deficiency.

XVIII.

That plaintiff in exercising its right to choose the forum elected to pay the tax and seek relief in the United States District Court.

XIX.

That on May 25th, 1956, plaintiff paid the trans-

feree assessment of $3,957.36 plus interest of $896.22 or a total of $4,853.58.

XX.

That plaintiff in paying the transferee assessment has the right to contest the tax issue of the transferor.

XXI.

That on the 29th day of May, 1956, plaintiff as transferee filed a claim for refund of $3,957.36, plus interest provided by law. Copy of said claim is attached and made a part hereof (Exhibit "B").

XXII.

That the selection of system of keeping books is primarily for the taxpayer. That the Commissioner is not authorized to enact legislation infringing upon the free choice of accounting system which is given taxpayer under Section 41 IRC nor to arbitrarily change the accounting system used by taxpayer where it clearly reflects income. That the Wendell National Bank has for more than twenty years kept its books and reported its income on the basis of cash receipts and disbursements. That the said cash basis is an approved standard method of accounting that clearly reflects income.

That the not due or collectible interest is not income under the cash basis method of accounting. That the Commissioner does not have the authority to change this cash basis taxpayer's method of accounting in the year of liquidation where taxpayer

has consistently reported its income on the cash basis.

XXIII.

That the individual stockholders of the Wendell National Bank who sold their stock to plaintiff for $418.50 per share paid tax as capital gain on the excess of the selling price over the cost or basis of their stock. Said excess is in fact the increment in value of the notes and other assets which were distributed to plaintiff in exchange for the Wendell National Bank stock purchased by plaintiff.

XXIV.

That plaintiff subsequently reported the interest on notes and bonds received through purchase of the Wendell National Bank as income when the interest was received, however, if offset same by the amount allocated as cost at time of liquidation.

XXV.

That the Commissioner of Internal Revenue rejected the claim for refund on the 5th, day of July, 1956. Copy is attached hereto and marked Exhibit "C."

Wherefore, plaintiff prays judgment against defendant in the sum of $3,957.36, together with interest provided by law and their costs and disbursements herein incurred.

/s/ MYRON E. ANDERSON,
Attorney for Plaintiff.

[Endorsed]: Filed July 24, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, the United States of America, by and through its attorney Sherman F. Furey, Jr., United States Attorney in and for the District of Idaho, and for answer to the complaint of the plaintiff admits, denies and alleges as follows:

1. Admits the allegations contained in Paragraph I of the complaint.

2. Admits the allegations contained in Paragraph II of the complaint.

3. Admits the allegations of Paragraph III of the complaint, except denies that this action arises under Section 115(c) and/or Section 112(b)(6) of the Internal Revenue Code of 1939. It is further denied that this action arises under Treasury Regulations 118, Section 39.115(a)-2.

4. Admits the allegations contained in Paragraph IV of the complaint.

5. Admits the allegations contained in Paragraph V of the complaint.

6. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VI of the complaint.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the truth

of the allegations contained in Paragraph VII of the complaint, except admits that on May 10, 1952, all assets and liabilities of the Wendell National Bank, both real and personal, were delivered to the plaintiff in exchange for the Wendell National Bank capital stock owned by the plaintiff.

8. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VIII of the complaint, except admits that on May 10, 1952, all the real estate and personal property owned by the Wendell National Bank was conveyed in kind to the plaintiff.

9. Denies the allegations contained in Paragraph IX of the complaint, except admits that the Wendell National Bank was in the general banking business prior to May 10, 1952.

10. Denies the allegations contained in Paragraph X of the complaint, except admits that on June 20, 1952, a corporation income tax return was filed for the Wendell National Bank for the period from January 1, 1952, to May 10, 1952. It is further admitted that the Wendell National Bank reported as taxable income in that return accrued interest in the amount of $10,843.55. It is further admitted that the plaintiff paid $5,577.61 on June 25, 1952, and on July 7, 1952, plaintiff paid $242.51 to the defendant in satisfaction of the tax liability terest in the amount of $10,843.55. It is further mitted that the income tax return for the Wendell National Bank for the period January 1, 1952, to

May 10, 1952, is attached to the complaint and marked Exhibit "A."

11. Denies the allegations contained in Paragraph XI of the complaint, except alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last three sentences of Paragraph XI.

12. Admits the allegations contained in Paragraph XII of the complaint, except denies that on the income tax return filed for the Wendell National Bank January 1, 1952, to May 10, 1952, there was any interest erroneously accrued, which was not due or collectible. It is further denied that there was ever any over-assessment of income taxes against the Wendell National Bank. The defendant alleges that $3,253.07 which was scheduled for refund to the plaintiff on February 17, 1955, was refunded to the plaintiff on that date.

13. Denies the allegations contained in Paragraph XIII of the complaint.

14. Admits the allegations contained in Paragraph XIV of the complaint.

15. Admits the allegations contained in Paragraph XV of the complaint, except denies that interest in the amount of $10,843.55 was not due or collectable.

16. Admits the allegations contained in Paragraph XVI of the complaint.

17. Admits the allegations contained in Paragraph XVII of the complaint.

18. Admits the allegations contained in Paragraph XVIII of the complaint.

19. Admits the allegations contained in Paragraph XIX of the complaint, except alleges that the payment referred to in Paragraph XIX of the complaint was made by the plaintiff on May 29, 1956.

20. Admits the allegations contained in Paragraph XX of the complaint.

21. Denies the allegations contained in Paragraph XXI of the complaint, except admits that on May 29, 1956, the plaintiff as transferee of the assets of the Wendell National Bank filed a claim for refund of $3,957.36, or any other amount legally refundable. It is further admitted that a copy of that claim is attached to the complaint and denominated Exhibit "B."

22. For answer to Paragraph XXII of the complaint the defendant alleges that the allegations contained therein, with the exception of the allegations contained in the third sentence of Paragraph XXII, constitute conclusions of law and as such require no answer. However, if it is determined that any or all of these allegations require an answer the defendant denies each and every one of them. The defendant further alleges that it is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in the third sentence of Paragraph XXII of the complaint.

23. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXIII of the complaint.

24. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XXIV of the complaint.

25. Admits the allegations contained in Paragraph XXV of the complaint.

Wherefore, having fully answered, the defendant prays for judgment in its favor, for dismissal of the plaintiff's complaint, and for the costs of this action.

SHERMAN F. FUREY, JR.,
United States Attorney;

By /s/ MARION J. CALLISTEN,
Assistant U. S. Attorney.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

STIPULATIONS OF FACT

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel of record, that the following facts shall be taken as

true without prejudice to the right of either party to furnish material and competent evidence of any other facts not inconsistent herewith or to object to the introduction in evidence of such facts on the grounds of immateriality or irrelevancy.

1. During all times mentioned herein plaintiff was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business in the City of Boise, Idaho. Plaintiff is a resident of the above-entitled judicial district.

2. The court has jurisdiction over this action by virtue of 28 U.S.C., Sections 1346(a), 1348 and 1402(a).

3. Prior to the 10th day of May, 1952, the Wendell National Bank, a corporation, was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business at Wendell, Idaho, within the above-entitled judicial district.

4. On the 10th day of May, 1952, plaintiff purchased the entire capital stock of the Wendell National Bank, Wendell, Idaho, for the sole purpose of acquiring the assets of said bank.

5. On the 10th day of May, 1952, immediately after the purchase of the Wendell National Bank stock by plaintiff, a special meeting of the stockholders of said Wendell National Bank was held, and by resolution, duly and regularly passed by a vote of one hundred per cent of the total capital

stock of said corporation, the Wendell National Bank was voluntarily dissolved and E. R. Jones, Vice-President of plaintiff corporation, was appointed liquidating agent, for the purpose of winding up the affairs of said corporation. A copy of the resolution of the stockholders of the Wendell National Bank voluntarily dissolving the said corporation and the appointment of E. R. Jones, Vice-President, as liquidating agent is attached as Exhibit A.

6 On May 10, 1952, all assets and liabilities of the Wendell National Bank, both real and personal, were delivered to plaintiff in accordance with the terms of Exhibit A to this stipulation.

7. On May 10, 1952, the Wendell National Bank was fully liquidated for all intents and purposes.

8. Said Wendell National Bank was in the general banking business and prior to its ceasing business and liquidating consistently reported its income on the "cash basis" method of accounting. A copy of affidavit from Virginia Dodge, C. P. A., an employee of the plaintiff is attached hereto as Exhibit B, to this stipulation.

9. On June 20, 1952, a corporation income tax return was filed for the Wendell National Bank, for the period from January 1, 1952, through May 10, 1952, by plaintiff. In that return the plaintiff included as taxable income accrued interest on notes receivable in the amount of $10,843.55. Plaintiff paid $5,577.61, on June 25, 1952, and on July 7,

1952, the plaintiff paid $242.51, to the defendant in satisfaction of the tax liability shown to be due on that return. A photocopy of the income tax return for the Wendell National Bank for the period January 1, 1952, to May 10, 1952, is attached as Exhibit C, to this stipulation.

10. The accrued interest on notes receivable was calculated at the time of liquidation of the Wendell National Bank in order to determine the value of the assets for liquidation purposes by computing the interest earned but not then payable, on each note from the date of the instrument to the date of the liquidation. The amount of the accrued interest was placed in pencil notation on each note. The interest was then totaled by means of an adding machine tape, the total being $13,191.19. Expenses attributable to this accrued interest on notes receivable had been deducted for income tax purposes when paid by the Wendell National Bank prior to its liquidation. Unpaid accrued expenses of the Wendell National Bank had not been deducted for income tax purposes at the date of liquidation.

11. Subsequently on or about November 18, 1954, the Commissioner of Internal Revenue through his delegate examined the final corporation income tax return of the Wendell National Bank for the period from January 1, 1952, to May 10, 1952. The revenue agent's report dated November 18, 1954, eliminated the accrued interest from income giving the following reason: "The Wendell National Bank has always kept records and filed returns on the cash

basis. Just prior to the distribution of the assets of the Wendell National Bank to the Idaho First National Bank on May 10, 1952, accrued interest was set up in Wendell record and return by means of a debit to the assets receivable and credit to taxable income. Although the interest had accrued it was not payable. The accrued interest does not represent taxable income to the Wendell National Bank on cash basis of computing income and is therefore eliminated."

12. The Internal Revenue Service determined that the elimination from income of accrued interest on notes receivable in the amount of $10,843.55, resulted in an overassessment in the amount of $3,253.07, which was scheduled for refund on February 17, 1955. The refund of that amount plus interest was received by the plaintiff on or about March 15, 1955.

13. Thereafter and prior to October 4, 1955, the Commissioner of Internal Revenue through his delegate re-examined the Wendell National Bank final corporation income tax return for the period from January 1, 1952, to May 10, 1952.

14. On October 4, 1955, the Commissioner of Internal Revenue issued the thirty day letter (Bureau Symbols A:R:JRC:30d:mjt) proposing to assess against plaintiff the amount of $3,253.07, plus interest as provided by law, constituting the plaintiff's liability as a transferee of the assets of the Wendell National Bank, Wendell, Idaho, for income

taxes due for the period ended May 10, 1952. In the report attached to that thirty day letter the accrued interest on notes receivable in the amount of $10,843.55, was included as taxable income of the Wendell National Bank and the Commissioner of Internal Revenue in his reason for including that interest as income referred to revenue ruling 255, Cumulative Bulletin 1953-2, 10. He further stated that, "The substance of the above ruling and the cited cases is that where the taxpayer liquidating corporation has performed substantially all the services necessary to establish its right to the income, the Commissioner is within his rights under Section 41 to change the method of determining income to include such items, Section 22(a)(20) relating to the gross income of corporations in liquidation notwithstanding. In view of the foregoing, it is held that interest accrued at May 10, 1952, in the amount of $10,843.55, is taxable to the liquidating corporation, the Wendell National Bank, and adjustment is made accordingly."

Plaintiff did not accept the findings of the Commissioner and on December 12, 1955, filed a protest.

15. On February 3, 1956, a conference was held on the protest with a member of the appellate staff of the Internal Revenue Service. No agreement was reached. However, the Commissioner correctly determined that the amount of accrued interest in question was $13,191.19, instead of $10,843.55.

16. On April 6, 1956, the Commissioner of Internal Revenue issued a deficiency notice to the

plaintiff stating that the deficiency of $3,957.36, plus interest as provided by law constituted its liability as a transferee of the assets of the Wendell National Bank, and would be assessed unless the plaintiff filed a petition in the Tax Court of the United States, within ninety days, seeking a redetermination of the deficiency.

17. Plaintiff in exercising its right to choose the forum elected to pay the tax and seek relief in the United States District Court.

18. On May 29, 1956, plaintiff paid the transferee assessment of $3,957.36, plus interest of $896.22 or a total of $4,853.58.

19. The plaintiff in paying the transferee assessment has the right to contest the tax issue of the transferor and is liable as transferee for any additional tax owed by the transferor.

20. On May 29, 1956, the plaintiff as transferee, filed a claim for refund of $3,957.36, or any other amount legally refundable by law, plus interest provided by law. A copy of that claim for refund is attached as Exhibit D to this stipulation.

21. The Wendell National Bank has always kept its records and filed its Federal income tax returns on the cash basis of accounting.

22. At the time it acquired the net assets of the Wendell National Bank, the plaintiff allocated $10,843.55, of the purchase price of the assets to accrued interest on notes receivable. In a subsequent revenue agents' examination of the Idaho First National

Bank, the amount of accrued interest on notes receivable was corrected to $13,191.19. When this accrued interest was collected by the plaintiff subsequent to its purchase of the assets of the Wendell National Bank it reported it as income for tax purposes but offset the collections against the allocated cost of the accrued interest on notes receivable, so that all of the amount collected was recovery of cost and not subject to income tax.

23. The individual stockholders of the Wendell National Bank who sold their stock to plaintiff for $418.50 per share paid a capital gains tax on the excess of the selling price over the cost or other basis of their stock. A copy of the Federal tax return of Austin and Eda Schouweiler, principal stockholders, is attached hereto as Exhibit E, to this stipulation.

24. That the Commissioner of Internal Revenue rejected the claim for refund on the 5th day of July, 1956. Copy of said rejection notice is attached as Exhibit F, to this stipulation.

/s/ MYRON E. ANDERSON,
Attorney for Plaintiff.

/s/ BEN PETERSON,
Attorney for the Defendant.

[Endorsed]: Filed August 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case coming on to be heard on completely stipulated facts, and the Court having considered the stipulation of facts, the exhibits thereto and the briefs of both parties filed herein, and having heretofore, on October 4, 1957, entered its Memorandum of Decision in favor of the defendant, and the Court being otherwise fully advised in the premises, does hereby make and enter its findings of fact and conclusions of law.

Findings of Fact

1. During all times mentioned herein plaintiff was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business in the City of Boise, Idaho. Plaintiff is a resident of the above-entitled judicial district.

2. Prior to the 10th day of May, 1952, the Wendell National Bank, a corporation, was a duly authorized and existing corporation, under and by virtue of the National Bank Act, with its principal place of business at Wendell, Idaho, within the above-entitled judicial district.

3. On the 10th day of May, 1952, plaintiff purchased the entire capital stock of the Wendell National Bank, Wendell, Idaho, for the sole purpose of acquiring the assets of said bank.

4. On the 10th day of May, 1952, immediately after the purchase of the Wendell National Bank stock by plaintiff, a special meeting of the stockholders of said Wendell National Bank was held, and by resolution, duly and regularly passed by a vote of one hundred per cent of the total capital stock of said corporation, the Wendell National Bank was voluntarily dissolved and E. R. Jones, Vice-President of plaintiff corporation, was appointed liquidating agent, for the purpose of winding up the affairs of said corporation.

5. On May 10, 1952, all assets and liabilities of the Wendell National Bank, both real and personal, were delivered to plaintiff.

6. On May 10, 1952, the Wendell National Bank was fully liquidated for all intents and purposes.

7. Said Wendell National Bank was in the general banking business and prior to its ceasing business and liquidating consistently reported its income on the "cash basis" method of accounting.

8. On June 20, 1952, a corporation income tax return was filed for the Wendell National Bank, for the period from January 1, 1952, through May 10, 1952, by plaintiff. In that return the plaintiff included as taxable income accrued interest on notes receivable in the amount of $10,843.55. Plaintiff paid $5,577.61 on June 25, 1952, and on July 7, 1952, the plaintiff paid $242.51 to the defendant in satisfaction of the tax liability shown to be due on that return.

9. The accrued interest on notes receivable was calculated at the time of liquidation of the Wendell National Bank in order to determine the value of the assets for liquidation purposes by computing the interest earned but not then payable, on each note from the date of the instrument to the date of the liquidation. The amount of the accrued interest was placed in pencil notation on each note. The interest was then totaled by means of an adding machine tape, the total being $13,191.19. Expenses attributable to this accrued interest on notes receivable had been deducted for income tax purposes when paid by the Wendell National Bank prior to its liquidation. Unpaid accrued expenses of the Wendell National Bank had not been deducted for income tax purposes at the date of liquidation.

10. Subsequently on or about November 18, 1954, the Commissioner of Internal Revenue through his delegate examined the final corporation income tax return of the Wendell National Bank for the period from January 1, 1952, to May 10, 1952. The revenue agent's report dated November 18, 1954, eliminated the accrued interest from income giving the following reason: "The Wendell National Bank has always kept records and filed returns on the cash basis. Just prior to the distribution of the assets of the Wendell National Bank to the Idaho First National Bank on May 10, 1952, accrued interest was set up in Wendell record and return by means of a debit to the assets receivable and credit to taxable income. Although the interest had accrued it was not pay-

able. The accrued interest does not represent taxable income to the Wendell National Bank on cash basis of computing income and is therefore eliminated."

11. The Internal Revenue Service determined that the elimination from income of accrued interest on notes receivable in the amount of $10,843.55 resulted in an overassessment in the amount of $3,253.07, which was scheduled for refund on February 17, 1955. The refund of that amount plus interest was received by the plaintiff on or about March 15, 1955.

12. Thereafter and prior to October 4, 1955, the Commissioner of Internal Revenue through his delegate re-examined the Wendell National Bank final corporation income tax return for the period from January 1, 1952, to May 10, 1952.

13. On October 4, 1955, the Commissioner of Internal Revenue issued the thirty-day letter (Bureau Symbols A:R:JRC:30d:mjt) proposing to assess against plaintiff the amount of $3,253.07, plus interest as provided by law, constituting the plaintiff's liability as a transferee of the assets of the Wendell National Bank, Wendell, Idaho, for income taxes due for the period ended May 10, 1952. In the report attached to that thirty-day letter the accrued interest on notes receivable in the amount of $10,843.55, was included as taxable income of the Wendell National Bank and the Commissioner of Internal Revenue in his reason for including that interest as income referred to revenue ruling 255,

Cumulative Bulletin 1953-2, 10. He further stated that "The substance of the above ruling and the cited cases is that where the taxpayer liquidating corporation has performed substantially all the services necessary to establish its right to the income, the Commissioner is within his rights under Section 41 to change the method of determining income to include such items, Section 22 (a) (20) relating to the gross income of corporations in liquidation notwithstanding. In view of the foregoing, it is held that interest accrued at May 10, 1952, in the amount of $10,843.55, is taxable to the liquidating corporation, the Wendell National Bank, and adjustment is made accordingly."

Plaintiff did not accept the findings of the Commissioner and on December 12, 1955, filed a protest.

14. On February 3, 1956, a conference was held on the protest with a member of the appellate staff of the Internal Revenue Service. No agreement was reached. However, the Commissioner correctly determined that the amount of accrued interest in question was $13,191.19, instead of $10,843.55.

15. On April 6, 1956, the Commissioner of Internal Revenue issued a deficiency notice to the plaintiff stating that the deficiency of $3,957.36, plus interest as provided by law constituted its liability as a transferee of the assets of the Wendell National Bank, and would be assessed unless the plain-

tiff filed a petition in the Tax Court of the United States, within ninety days, seeking a redetermination of the deficiency.

16. Plaintiff in exercising its right to choose the forum elected to pay the tax and seek relief in the United States District Court.

17. On May 29, 1956, plaintiff paid the transferee assessment of $3,957.36, plus interest of $896.22 or a total of $4,853.58.

18. The plaintiff in paying the transferee assessment has the right to contest the tax issue of the transferor and is liable as transferee for any additional tax owed by the transferor.

19. On May 29, 1956, the plaintiff as transferee, filed a claim for refund of $3,957.36, or any other amount legally refundable by law, plus interest provided by law.

20. The Wendell National Bank has always kept its records and filed its federal income tax returns on the cash basis of accounting.

21. At the time it acquired the net assets of the Wendell National Bank, the plaintiff allocated $10,843.55 of the purchase price of the assets to accrued interest on notes receivable. In a subsequent revenue agent's examination of the Idaho First National Bank, the amount of accrued interest on notes receivable was corrected to $13,191.19. When this accrued interest was collected by the plaintiff subsequent to its purchase of the assets of the Wendell

National Bank it reported it as income for tax purposes but offset the collections against the allocated cost of the accrued interest on notes receivable, so that all of the amount collected was recovery of cost and not subject to income tax.

22. The individual stockholders of the Wendell National Bank who sold their stock to plaintiff for $418.50 per share paid a capital gains tax on the excess of the selling price over the cost or other basis of their stock.

23. The Commissioner of Internal Revenue rejected the claim for refund on the 5th day of July, 1956.

Conclusions of Law

1. The court has jurisdiction over this case by virtue of 28 U.S.C. Section 1346 (a) (1).

2. The position taken by the defendant in this case is warranted by statute and has ample support in the decisions.

3. Accordingly the interest accrued on notes receivable in the taxable period ending with the liquidation of the Wendell National Bank are taxable as income to it in that year, notwithstanding the fact that it reported its income for tax purposes on the cash receipts and disbursements basis.

4. Judgment will be entered in favor of the defendant, dismissing the plaintiff's complaint, with costs to be paid by the plaintiff.

Dated this 2nd day of December, 1957.

/s/ WILLIAM HEALY,
Acting United States District Judge.

[Endorsed]: Filed December 2, 1957.

In the United States District Court for the District of Idaho, Southern Division

Civil Action No. 3269

THE IDAHO FIRST NATIONAL BANK,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause having been submitted on an agreed statement of facts and stipulation, and the court having fully considered the pleadings, the agreed statement of facts and stipulation, and the briefs of the parties on file herein, and being fully advised and after deliberating in the premises, and having filed herein its findings of fact and conclusions of law and having heretofore denied plaintiff's motion for amendment of said findings of fact and conclusions of law, and having directed

that judgment be entered in accordance with the findings of fact and conclusions of law and having heretofore denied plaintiff's motion for amendment of said findings of fact and conclusions of law, and having directed that judgment be entered in accordance with the findings of fact and conclusions of law heretofore entered, now, therefore, by reason of the law and the findings aforesaid, it is hereby

Ordered, Adjudged, and Decreed that defendant, United States of America, do have and is awarded judgment against the plaintiff, the Idaho First National Bank, and that said defendant do have and recover of and from said plaintiff its costs in this action.

Dated this 24th day of January, 1958.

/s/ WILLIAM HEALY,
Acting District Judge.

[Endorsed]: Filed January 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Idaho First National Bank, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the final judgment dated January 24, 1958, entered in this action on January 27, 1958.

/s/ MYRON E. ANDERSON,

ANDERSON, KAUFMAN AND ANDERSON,

By /s/ EUGENE H. ANDERSON,
Attorneys for Plaintiff.

[Endorsed]: Filed March 19, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75(RCP):

1. Complaint.
2. Answer.
3. Stipulation of Fact with Exhibits A, B, C, D, E and F attached.
4. Minutes of the Court of August 14, 1957.
5. Memorandum of Decision dated October 4, 1957.
6. Findings of Fact and Conclusions of Law.
7. Judgment.

8. Notice of appeal.
9. Statement of points.
10. Designation of appellant of contents of record on appeal.
11. Designation of appellee of additional portions of record on appeal.
12. Copy of docket entries.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court, this 21st day of April, 1958.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 16004. United States Court of Appeals for the Ninth Circuit. The Idaho First National Bank, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: April 24, 1958.

Docketed: May 5, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16004

THE IDAHO FIRST NATIONAL BANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS RELIED UPON

Pursuant to Rule 17, subsection 6, of the above-entitled Court, appellant makes Statement of Points as follows:

I.

Interest neither due nor payable, on notes and obligations to a banking corporation reporting its income for tax purposes on a cash basis, is not taxable income to the banking corporation upon its liquidation and the transfer of its assets to its shareholder.

Dated May 2nd, 1958.

/s/ MYRON E. ANDERSON,

ANDERSON, KAUFMAN
AND ANDERSON,

By /s/ EUGENE H. ANDERSON,
Attorneys for Appellant.

[Endorsed]: Filed May 5, 1958.

No. 16,004

United States Court of Appeals

For the Ninth Circuit

THE IDAHO FIRST NATIONAL BANK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

BRIEF OF APPELLANT.

MYRON E. ANDERSON,
Idaho Building, Boise, Idaho,
ANDERSON, KAUFMAN AND ANDERSON,
EUGENE H. ANDERSON,
Idaho Building, Boise, Idaho,
Attorneys for Appellant.

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United States Court of Appeals

For the Ninth Circuit

THE IDAHO FIRST NATIONAL BANK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

BRIEF OF APPELLANT.

STATUTES AND REGULATIONS.

26 U.S.C.A.: (Internal Revenue Code (1939)

Sec. 22. Gross Income.

(a) General Definition — Gross income includes gains, profits, . . . interest . . .

Sec. 41. (Accounting Period and Methods). General Rule. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the

Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in Section 48, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

Treasury Regulations 111:

Sec. 29.41-2. Bases of Computation and Changes in Accounting Methods. Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48, for definitions of "paid or accrued" and "paid or incurred". All items of gross income shall be included in gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48 . . . A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 29.42-2 and 29.42-3). On the other hand appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property . . .

Sec. 29.41-3. Methods of Accounting. It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law

contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so . . .

Sec. 29.41-1. Computation of Net Income. Net income must be computed with respect to a fixed period . . . If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for . . .

Sec. 29.52-1. Corporation Returns. Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income . . . A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of the year during which it was in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under state law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up of it affairs such as for the purpose of suing and being sued . . .

Sec. 29.22(a)20. Gross Income of a Corporation in Liquidation. When a corporation is dissolved . . . No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation,

however they may have appreciated or depreciated in value since their acquisition . . .

Sec. 29.115-3. Earnings or Profits. In determining the amounts of earnings or profits . . . due consideration must be given to the facts, . . . the amount of earnings or profits in any case will be dependent upon the method of accounting properly employed in computing net income. For instance, a corporation keeping its books and filing its income tax returns under sections 41, 42 and 43 on the cash receipts and disbursements basis may not use the accrual basis in determining earnings and profits; . . .

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

Complaint was filed by The Idaho First National Bank, appellant, against the United States, respondent, in the District Court of the United States for the District of Idaho, Southern Division, for the recovery of income taxes theretofore paid. Jurisdiction was based upon Title 28 United States Code, Secs. 1346(a), 1348 and 1402(a). (Tr. pages 3 to 11.) The cause was placed at issue by Answer of the United States. (Tr. pages 12 to 16.) The cause was tried and submitted for decision on Stipulations of Fact, the Hon. William Healy, acting District Judge, presiding. (Tr. pages 16 to 23.) Findings of Fact and Conclusions of Law, and Judgment based thereon, in favor of respondent, the United States, were made and entered in the lower court. (Tr. pages 24 to 32.) The Idaho First National Bank, plaintiff below and appellant here, appealed to this court from the Judgment.

STATEMENT OF THE CASE.

Wendell National Bank, a corporation with its banking house at Wendell, Idaho, operated for many years. On May 10, 1952 appellant Idaho First National Bank purchased from the stockholders of Wendell National Bank the entire capital stock of the latter corporation. The purchase was for the sole purpose of acquiring the assets of the Wendell bank.

Immediately thereafter and on the same day as the purchase of the stock, Wendell bank was voluntarily dissolved and all of its assets and liabilities distributed to appellant.

Included in the assets were the notes evidencing the outstanding loans of the Wendell bank which were not due nor payable. The notes bore interest which was not due nor payable.

The Wendell bank had consistently reported its net income for tax purposes on the cash basis method of accounting. Its cash basis method covered both its gross income and its deductions. It reported on a calendar year basis.

However, the appellant, as transferee of the assets, caused income tax return to be filed for the Wendell bank for the period January 1, 1952 through May 10, 1952, reporting as income the amount of the interest on the notes computed to the time of dissolution and distribution, although such interest was neither due nor payable, and the notes unmatured. The unpaid expenses and deductible items, however, were not computed nor used as a deduction against income in the tax return.

Subsequently, examination of such tax return was made by the Internal Revenue Service, which, upon such examination, eliminated such interest from income of the Wendell bank, on the ground that such interest was not taxable income to the Wendell bank for the reason that it was a cash basis taxpayer. The portion of the tax attributable to the interest was refunded to the appellant.

Thereafter, the Internal Revenue Service re-examined the tax return of the Wendell bank, and reversed its decision, and included such interest in income in the period covered by the tax return. Its reason appearing in the Stipulations of Fact, Section 13 (Tr. pages 27 and 28) is quoted as follows:

> "The substance of the above ruling and the cited cases is that where the taxpayer liquidating corporation has performed substantially all the services necessary to establish its right to the income, the Commissioner is within his rights under Section 41 to change the method of determining income to include such items, Section 22 (a) (20) relating to the gross income of corporation in liquidation notwithstanding."

It appears obvious that the reference to "Section 22(a)(20)" is in error. The Commissioner must have intended to refer to Regulation 111, Sec. 29.22(a)-20. The Section 41 referred to is obviously Section 41 of the 1939 Internal Revenue Code. (Title 26 USCA Sec. 41) (1939).

The appellant as transferee of the assets, paid the tax assessed, filed application for refund which was denied, and instituted this action.

The amount of the interest involved was finally determined to be $13,191.19 and the amount of tax involved $3,957.36 plus interest.

The calculation and computation by the Commissioner included in income only the interest, which interest was neither due nor payable at the date of dissolution. No calculation, computation, or other consideration, was given to any of the unpaid expenses or deductions of Wendell Bank, attributable to the period covered by the tax return.

It is the position of appellant that:

A taxpayer may compute its income, and make its income tax returns, on a cash basis; the selection of the cash basis system is lodged exclusively in the taxpayer provided it is within the statutory limits of clearly reflecting income for tax purposes and such method must be consistent from year to year; if the taxpayer's method of accounting clearly reflects income, statute is mandatory on both taxpayer and Commissioner that taxable income be determined in accordance therewith;

That the word "clearly" within the statute permitting taxpayer to make its income tax return on cash basis in accordance with method of accounting regularly employed in keeping its books, means plainly, honestly, straightforwardly and frankly;

That the word "method" within the statute permitting taxpayer to make income tax return on a cash basis means the way of keeping the taxpayer's books according to a defined and regular plan; and, only where the "method" (being a way of keeping

taxpayer's books according to a defined and regular plan) does not clearly reflect income, can the Commissioner change the method.

It is further the position of appellant that the decision of the Commissioner is not actually a change of method.

It is the further position of appellant that:

The distribution to shareholders of accrued items of income, in the process of dissolution and distribution of a cash basis corporate taxpayer, is not an assignment of anticipatory income;

That where the shareholders of a fully dissolved corporation receive money or other property which would have been taxable income to the corporation at the time, if the corporation were still in existence, the corporation is not taxable thereon; and,

That upon liquidation and distribution of the assets of a corporation, to the shareholder, income derived from the property is taxable to the recipient of the distributed share, and not to the corporation.

QUESTION PRESENTED.

Where a banking corporation has consistently reported its income and deductions for income tax purposes, including its interest income, on a cash receipts and disbursements method of accounting, can the Commissioner, in the year of its liquidation, include in income, interest which was neither due nor payable on unmatured notes, in order to make such interest taxable income to such banking corporation in the tax period ending with its liquidation.

SPECIFICATIONS OF ERROR.

The court erred in its concluding as a matter of law (Tr. page 30), that the position taken by the respondent in this case is warranted by statute and has ample support in the decisions.

The court erred in concluding as a matter of law (Tr. page 30) that the interest on notes receivable, which interest was neither due nor payable, in the taxable period ending with the liquidation of the Wendell bank, is taxable as income to it in that period, notwithstanding the fact that it reported its income for tax purposes on the cash receipts and disbursements basis.

The court erred as a matter of law in concluding (Tr. page 30) that judgment be entered in favor of defendant and dismissing plaintiff's complaint.

ARGUMENT.

RELATIVE RIGHTS OF TAXPAYER AND COMMISSIONER ON ACCOUNTING METHOD AND DEFINITIONS.

The Wendell bank, for many years, consistently reported its income for tax purposes on a cash receipts and disbursements method of accounting. Its right to do so is well founded in the Internal Revenue Acts, Regulations and Decisions.

Selection of this basis or system of accounting was lodged exclusively with the Wendell bank, with only one proviso, namely, that such method clearly reflect income for tax purposes and that such method be consistent from year to year. If such method clearly

reflects income, then the statute, (Sec. 41 of the Internal Revenue Code) (Tit. 26, 1948 Edition, USCA, Sec. 41; Tit. 26 U.S.C.A. Int. Rev. Code 1939 as amended, Sec. 41) is mandatory on both the taxpayer and Commissioner that the taxable income be determined in accordance therewith.

Huntington Securities Corp. v. Busey, 112 F. 2d 368;

Glenn v. Kentucky Color etc., 186 F. 2d 975.

The courts have defined the word "clearly" as used in the statute to mean plainly, honestly, straightforwardly and frankly. The courts have distinguished between the words "clearly" and "accurately", stating that the cash receipts and disbursements method of accounting frequently does not accurately reflect earned or partially earned income or incurred or partially incurred expense. The courts have defined the word "accurately" in the ordinary use of the term to mean precisely, exactly, correctly and without error or defect and have distinguished such expressions from the word "clearly" as used in the statute.

Huntington Securities Corp. v. Busey, 112 F. 2d 368;

Welch v. DeBlois, 94 F. 2d 842;

Wolf Bakery and Cafeteria Co., T. C. Memo, P.-H. 46,117, (Docket No. 7899; 5-23-46).

The courts have defined the word "method" as used in the statute as being according to a way of keeping the taxpayer's records according to a defined and regular plan.

Huntington Securities Corp. v. Busey, 112 F. 2d 368.

Here we have a taxpayer which for many years used the cash receipts and disbursements method, which method was consistent, and which clearly reflected income. Its income which had been received and its expenses which had been disbursed, as clearly reflected its net income as a cash basis taxpayer in the year of its liquidation as in any prior year.

The courts have held that a taxpayer reporting on a purely cash receipts and disbursements method, has no right to accrue either receipts or disbursements, and have held that the method consistently followed may affect either the taxpayer or the government adversely from time to time, but that the fact that it may affect either the taxpayer or the government adversely is not reason for either the Commissioner or the taxpayer to change the method.

Cecil v. Commissioner of Internal Revenue, 100 F. 2d 896;

Osterloh v. Lucas, 37 F. 2d 277;

J. H. Martinus & Sons v. Commissioner of Internal Revenue, 116 F. 2d 732;

United States v. Mitchell, 46 S. Ct. 419, 271 U.S. 9, 70 L. Ed. 799.

CHANGES BY COMMISSIONER.

In this case, the Commissioner has selected a classification of income, namely interest, on loans made by the bank evidenced by notes which had not matured, and the interest on which was not due nor payable. Admittedly, interest on this type of obliga-

tion is the main source of a bank's income; and, on some of the notes the interest had been accruing from during the prior year.

The Commissioner has accrued such interest income into the taxable year of liquidation, solely because of the liquidation. The determination of the Commissioner was made solely for the reason that the banking corporation had liquidated.

Had the Wendell bank continued in existence, it could hardly be said that the Commissioner would have been entitled to make any such a change, either in the year involved here or in any other year.

The Wendell bank, as every bank, has expenses attributable to the production of income and to the production of its interest to be received on its outstanding loans. Such expenses include but are by no means limited to, ad valorem and other taxes not due at the time of liquidation. None of the expenses were accrued by the Commissioner to the time of liquidation nor for the taxable period in the year of liquidation.

The acts of the Commissioner created a distortion of income in the taxable period in question.

DISTRIBUTION BY CORPORATION ON DISSOLUTION.

This court has held that distribution to the shareholders of accrued items of income, in the process of dissolution and distribution of a cash basis corporate taxpayer, is not an assignment of anticipatory

income and has held that where such shareholders receive money or other property which would have been taxable income to the corporation at the time if it were still in existence, the corporation is not taxable thereon. Upon liquidation and distribution of the assets of a corporation, to its shareholders, income derived from the property is reportable by the recipient of the distributed share.

United States v. Horschel, 205 F. 2d 646;
Commissioner of Internal Revenue v. Henry Hess Co., 210 F. 2d 553;
Herbert v. Riddell, 103 F. Supp. 369;
Telephone Directory Advertising Co. v. United States, 142 F. Supp. 884.

The lower court should be reversed.

Dated, Boise, Idaho,
July 11, 1958.

MYRON E. ANDERSON,
ANDERSON, KAUFMAN AND ANDERSON,
By EUGENE H. ANDERSON,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Exhibits	Identified, Offered and Received in Evidence
EXHIBIT A. Resolution for dissolution and distribution of assets of Wendell National Bank	Tr. 18 (Stip. No. 5)
EXHIBIT B. Affidavit of Virginia Dodge, C.P.A., that Wendell National Bank reported its income on cash basis of accounting	Tr. 18 (Stip. No. 8)
EXHIBIT C. Copy of income tax return of Wendell National Bank for period January 1, 1952 to May 10, 1952	Tr. 19 (Stip. No. 9)
EXHIBIT D. Claim for refund	Tr. 22 (Stip. No. 20)
EXHIBIT E. Federal income tax return of Austin and Eda Schouweiler for the year 1952	Tr. 23 (Stip. No. 23)
EXHIBIT F. Notice of rejection of claim for refund	Tr. 23 (Stip. No. 24)

No. 16004

United States Court of Appeals
for the Ninth Circuit

THE IDAHO FIRST NATIONAL BANK, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION

HONORABLE WILLIAM HEALY, *Acting District Judge*

BRIEF OF AMICI CURIAE

HOWE, DAVIS, RIESE & JONES
JOHN M. DAVIS and
JAMES H. MADISON,
Amici Curiae.

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI CURIAE

Pursuant to leave of this court heretofore granted under date of August 18, 1958, and consented to by the parties to this appeal, the writers of this brief join with the Appellant in urging that the decision of the lower court be reversed.

The writers of this brief represent Miners & Merchants Bank of Chelan, Washington, which was placed in voluntary liquidation on January 31, 1953, and whose assets were distributed to its stockholders immediately after it was placed in voluntary liquidation. This bank was a cash basis taxpayer and at the time of its liquidation held certain notes and obligations upon which there was accrued interest. The Commissioner of Internal Revenue has taken the position that this accrued interest was includable in the income of Miners & Merchants Bank during its final taxable year and the bank has contested this position. The issue raised by this contest

is identical with that raised in the present appeal and the ultimate determination of this issue will undoubtedly turn upon the outcome of this appeal. These facts are the basis of the interest of the writers of this brief in urging the reversal of the decision of the lower court.

II. ARGUMENT

A. Argument in Support of Reversal of Decision of Lower Court.

1. Wendell National Bank had a right to report its income on the "cash basis" and this method of accounting clearly and accurately reflected the income of the bank.

Wendell National Bank (hereinafter called "Wendell Bank") had the right and was required under the Internal Revenue Acts, Regulations and Decisions to report its income for income tax purposes on the "cash basis" or on the "accrual basis." *Huntington Securities Corporation v. Busey,* 112 F.(2d) 368 (6th Cir., 1940), particularly at page 370. The bank chose to report its income for tax purposes on the "cash basis" which means on a cash receipts and disbursements method of accounting (Tr. 18, 25). Under this method of accounting, all items of gross income are included in the taxable year in which they are received by the taxpayer (or are constructively received in certain instances), and deductions are taken in the year in which they are paid by the taxpayer. Accrued interest is not includable in income of a cash basis taxpayer either on unmatured or past due obligations. See U.S. Treasury Regulation 111, Sec. 29.41-2. The right of Wendell Bank to have

selected the cash basis for reporting its income for tax purposes is further emphasized by the fact that the Commissioner of Internal Revenue at no time questioned the basis selected by it. In fact, when the final income tax return of the Wendell Bank, for the period ending May 10, 1952, was filed on the "accrual basis," the Commissioner upon first examining the return eliminated accrued interest from the income of the Wendell Bank on the ground that the Wendell Bank, a cash basis taxpayer, erroneously included accrued interest as "income" (Tr. 19, 20, 26, 27).

In pursuing the cash basis for reporting for income tax purposes, the Wendell Bank did not include as "income" any obligations to it for interest, whether due and payable or not yet due and payable, at the close of any taxable year.

Once having selected the cash basis of accounting for income tax purposes, the Wendell Bank is required to use that same basis consistently, year after year, and will not be permitted to change to the "accrual basis," except upon receiving the consent of the Commissioner. U.S. Treasury Regulation 111, Sec. 29.41-2. Thus, in the first instance, the Wendell Bank is required to file its final tax return on the same basis on which it has filed all prior returns, namely, the cash basis. It is the position of the Appellant that such cash basis of accounting clearly reflected income, within the requirement of 26 U.S.C.A. (Internal Revenue Code, 1939) Sec. 41, relating to accounting period and methods.

2. In the event the Commissioner could change the method of accounting of the Wendell Bank, he must change it to a recognized "method" of accounting and not to the distorted method of accounting adopted by the Commissioner in this case.

The Commissioner of Internal Revenue is now claiming that the method employed by the Wendell Bank does not clearly reflect the income for the period ending May 10, 1952. We do not concede that he is correct in that determination. Assuming, however, for the moment, that the method employed by the Wendell Bank did not clearly reflect the income of the bank for the tax year involved, then the authority of the Commissioner of Internal Revenue under 26 U.S.C.A. (Internal Revenue Code, 1939) Sec. 41, is to compute the income according to some other "method," being a method which in the opinion of the Commissioner does clearly reflect the income.

We urge that the Commissioner has no authority under the aforesaid section of the Internal Revenue Code or any other section to make any computation of the income of the Wendell Bank other than according to a recognized "method" of accounting. U.S. Treasury Regulation 111, Sec. 29.41-2. Basically, the two recognized "methods" are the cash basis method and the accrual basis method. *Huntington Securities Corporation v. Busey, supra.* Thus, still assuming that the cash basis method did not "clearly reflect income" of the Wendell Bank for the period involved, the Commissioner could only change the bank to the "accrual method" for the period involved. See *Security Flour*

Mills Company v. Commissioner of Internal Revenue, 321 U.S.281, 88 L.Ed. 725, 64 S.Ct. 596 (1944), wherein the Supreme Court of the United States clearly recognized the proposition that neither the Commissioner nor the taxpayer can substitute a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system. At pages 285 and 286, the Supreme Court further stated the following to be the well understood and consistently applied doctrine:

> " . . . Cash receipts on matured accounts due on the one hand, and cash payments or accrued definite obligations on the other, should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer."

The recent case of *Waldheim Realty and Investment Company v. Commissioner,* 245 F.(2d) 823 (8th Cir., 1947), follows the ruling of the Supreme Court that a hybrid basis of accounting is not permitted and prohibited the Commissioner from applying an accrual basis of accounting to a portion of the expenses of a cash basis taxpayer.

In making such a change, the Commissioner must, of course, accrue all items of expense and deductions as well as all items of income on the accrual basis in the income tax return for the close of the tax period in-

volved. See particularly the second sentence of U.S. Treasury Regulation 111, Sec. 29.41-2, which states:

> " . . . A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency . . . "

In addition, for the change to the "accrual method" to clearly reflect the income of the bank for the period involved, it is well settled that the Commissioner must place the bank on an accrual basis as of the beginning of the period involved. 3 CCH 1958 Stand. Fed. Tax Rep., Para. 2982.05. Then, only by this change of method could the Commissioner properly urge that the accrual method which he adopted "clearly reflected income" for the period involved.

The limitation of the right of the Commissioner with respect to the method of computing income, set forth in 26 U.S.C.A. (Internal Revenue Code, 1939) Sec. 41, was for the purpose of preventing the distortion of income such as is produced by the actions of the Commissioner in connection with the Wendell Bank. The Wendell Bank should pay an income tax for the tax period involved based on a method of accounting which clearly reflects income. Either a true cash basis of accounting for the year or an accrual basis of accounting for the year, as above set forth, would "clearly reflect income."

When the Commissioner endeavors, however, to accrue interest on notes held by the Wendell Bank, where the interest has not yet been paid to the bank before the

end of the tax year involved, he is distorting the income of the bank and not computing it in accordance with any "method" of accounting. For example: Items of interest which had accrued at December 31, 1951, are included by the Commissioner in the income of the Wendell Bank for the year commencing January 1, 1952, and ending May 10, 1952. Further, unpaid accrued expenses at the date of liquidation were not deducted (Tr. 19, 26).

3. Summary of argument that the Wendell Bank properly reported its income and the Commissioner erred in including accrued interest in the final income tax return of the Wendell Bank.

To summarize this portion of the argument, it is our position:

(1) That the Wendell Bank was on a consistent and established cash basis of accounting for income tax purposes which clearly reflected income and which had never been challenged by the Internal Revenue Service, and that it was required therefore to file its final income tax return upon the same basis.

(2) That in the event the cash basis did not clearly reflect the income of the Wendell Bank, then the Commissioner of Internal Revenue has authority to change the accounting basis to the "accrual basis" for the period involved. In making the change to the accrual basis, all items of income and all items of expense and deductions must be accrued at the close of the preceding tax period, December 31, 1951, and at the close of the final tax period, May 10, 1952, and the income computed

under the accrual basis of accounting for the tax year involved.

(3) That it is beyond the power of the Commissioner to single out accrued interest on loans as of May 10, 1952, and arbitrarily add that item to income because this inconsistency produces a distortion of income and makes the accounting for the Wendell Bank for its final tax year on a basis other than a recognized "method of accounting," to-wit: either the cash basis or the accrual basis.

B. Answer to Argument That Some Interest on Notes Held by Wendell Bank Is Not Reported as Income

On May 10, 1952, the Wendell Bank was completely dissolved by the distribution of a liquidating dividend to the stockholders of the bank (Tr. 25). The corporation retained no assets after that date. Under U.S. Treasury Regulation 111, Sec. 29.52-1, the corporation is not in existence after May 10, 1952, even though it may continue as a corporation for certain limited purposes such as for the purpose of suing and being sued. Certainly in promulgating the regulations, the Commissioner of Internal Revenue had in mind that the liquidating corporation might be either on the cash basis or the accrual basis of accounting.

There is no hint in the regulations that such a corporation be required, in its final year, to change its method of accounting. Thus, it must have been known by the Commissioner of Internal Revenue that a cash basis corporation might distribute all of its assets and close

its taxable year. It must have been contemplated by the Commissioner that there would be accrued interest and accrual items of every kind, both income and expense, upon the books of such a liquidating corporation which was on the cash basis.

Presumably, the regulation could have provided that the corporation would continue in existence for tax purposes, if it were on the cash basis, until such time as the accrued items of expense had been paid and the accrued items of income had been received. However, U.S. Treasury Regulation 111, Sec. 29.52-1 provides to the contrary. Therefore, it is our position that after the liquidation of a cash basis taxpayer the stockholder or stockholders receiving the distribution must report on their income tax returns all of the income received by them after the date of dissolution. In this case the sole stockholder, at the time of dissolution, was the Appellant, The Idaho First National Bank.

For example, if the Wendell Bank on September 10, 1951, had made a loan of $100.00, taking a promissory note due in one year with interest at the rate of 6% per annum, the following tax consequences would apply:

(1) There would be no income shown by the Wendell Bank at December 31, 1951, on the note, since the Wendell Bank was on the cash basis of accounting.

(2) There would be no income shown by the Wendell Bank in its final tax return for the period ending May 10, 1952, because it remains on the cash basis of accounting.

(3) When the stockholder of the Wendell Bank, who received a distribution of the note on May 10, 1952, collected $106.00 on September 10, 1952, the stockholder would have to report as income $6.00.

(4) In the event that the contention of the Government is sustained, and the Wendell Bank must report as income the $4.00 which had accrued as interest on the note by May 10, 1952, then the stockholder would be given a basis of $104.00 in the note and would only have to report as income on September 10, 1952, the sum of $2.00.

(5) Even if the contention of the Commissioner should be sustained that the cash method of accounting does not clearly reflect the income of the Wendell Bank for the period ending May 10, 1952, the Commissioner must put the bank on a recognized method, the accrual method of accounting. Upon this method it should be permitted to reflect as income for the period from January 1 to May 10, 1952, only that portion of the $4.00 total interest accrual on the note by May 10, 1952, which accrued after January 1, 1952, or the sum of $2.17. We submit that this handling of the situation would, however, give a basis of $104.00 to the stockholder, who then would have to report as gross income only the $2.00 additional when he received payment of $106.00 on September 10, 1952.

(6) In the event the Commissioner is successful in putting the Wendell Bank upon the accrual basis, the $1.83 of interest accrued at December 31, 1951, would

be subject to tax in the year 1951 if the Commissioner put the Wendell Bank on the accrual basis for that year.

Thus, it is apparent that under any handling of the situation the entire $6.00 will be reported as a part of the gross income of some taxpayer. The argument that some of the accrued interest in the case of the Wendell Bank would not be reported as income by any taxpayer we submit is in error.

C. Conclusion

In conclusion, it is submitted that:

(1) The District Court judgment should be reversed and the final income tax return of the Wendell Bank should be permitted to stand upon its present basis, computed upon the cash receipts and disbursements method of accounting.

(2) That if the Commissioner has demonstrated that the cash basis does not clearly reflect income of the Wendell Bank for the period involved, he must put the bank upon a recognized method of accounting other than the "cash basis," and this means that he must put it upon the "accrual basis" for the tax period involved. Putting the bank upon the accrual basis means that income, expense and deductions must be reflected in the final year based upon the increase or decrease from those accruals existing at the beginning of the period. Otherwise, the accrual method selected by the Commissioner would "not clearly reflect income" for the period

involved, but would on the contrary result in a gross distortion of income.

It is respectfully submitted by the writers of this brief that the decision of the District Court should be reversed and that judgment should be entered in favor of the appellant in accordance with the prayer of its complaint.

Respectfully submitted,

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SOUTHERN DIVISION

BRIEF FOR THE APPELLEE

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OPINION BELOW

The memorandum of decision,[1] findings of fact and conclusions of law of the District Court (R. 24-31) are not officially reported.

JURISDICTION

This appeal involves income taxes for the period from January 1, 1952, to May 10, 1952, in the sum of $3,957.36 allegedly overpaid by the taxpayer as transferee of the assets of the Wendell National Bank, together with interest as provided by law. (R. 3-11.) On May 29, 1956, taxpayer paid the transferee assessment of $3,957.36, plus interest of $896.22, or a total of $4,853.58; and on the same day, taxpayer filed a claim for refund. (R. 22, 29.) The Commissioner of Internal Revenue rejected the claim for refund on July 5, 1956. (R. 23, 30.) On July 24, 1956, and within the time prescribed by Section 3772 of the Internal Revenue Code of 1939, this suit was instituted in the District Court. Jurisdiction was conferred on the District Court by 28 U.S.C., Sections 1340 and 1346. Judgment was entered against the taxpayer on January 27, 1958. (R. 31-32.) Within sixty days thereafter, and on March 19, 1958, a notice of appeal to this Court was filed by taxpayer. (R. 32-33.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly upheld the determination of the Commissioner of Internal Revenue that accrued interest on notes receivable was

1/ The memorandum of decision is not included in the printed record, and a copy is attached as Appendix B, infra.

reportable as income by a cash basis bank for the taxable period ending with its liquidation.

STATUTE AND REGULATIONS INVOLVED

These are set out in Appendix A, *infra*

STATEMENT

The facts as stipulated (R. 16-23) and found by the District Court (R. 24-30) may be summarized as follows:

Prior to May 10, 1952, the Wendell National Bank (Sometimes referred to as "Wendell" herein) was a corporation organized and existing under the National Bank Act, with its principal place of business at Wendell, Idaho. (R. 17, 24.)

On May 10, 1952, the taxpayer[2] (plaintiff-appellant herein) purchased the entire capital stock of the Wendell National Bank for the sole purpose of acquiring its assets. On the same day, and immediately after the purchase, a special meeting of stockholders was held and a resolution was passed authorizing dissolution of Wendell and distribution of all its assets to taxpayer. On the same day (May 10, 1952), and in accordance with this resolution, all the assets of Wendell were distributed to taxpayer and all liabilities of Wendell were assumed by the taxpayer. Thereafter, Wendell was fully liquidated for all intents and purposes. (R. 17-18, 24-25.)

2/ The term "taxpayer" is used herein for convenience in referring to the transferee, The Idaho First National Bank, although the transferor, Wendell National Bank, is the original taxpayer whose taxes are involved. No question as to transferee liability is presented and it is stipulated and found (R. 22, 29) that plaintiff in paying the transferee assessment has the right to contest the tax issue of the transferor and is liable as transferee for any additional tax owed by the transferor. See Section 311 of the Internal Revenue Code of 1939.

Wendell National Bank was in the general banking business and consistently reported its income on the cash basis method of accounting. On June 20, 1952, a corporation income tax return for the period January 1, 1952, through May 10, 1952, was filed in behalf of Wendell, and the tax shown to be due on the return was paid by the taxpayer. In that return there was included as taxable income the accrued interest on notes receivable in the amount of $10,843.55. This accrued interest on notes receivable was calculated at the time of Wendell's liquidation in order to determine the value of its assets for liquidation purposes, and it was calculated by computing the interest earned but not then payable on each note to the date of liquidation. Expenses attributable to this accrued interest on notes receivable had been deducted for income tax purposes when paid by Wendell prior to its liquidation. Unpaid accrued expenses of Wendell had not been deducted for income tax purposes at the date of liquidation. (R. 18-19, 25-26.)

The accrued interest was collected by taxpayer subsequent to the liquidation of Wendell, and when so collected was reported by taxpayer as income for tax purposes. However, taxpayer offset the collections against the allocated cost of the accrued interest on notes receivable, so that all of the amount collected was treated as recovery of cost and therefore not subject to income tax. (R. 23, 29-30.)

The individual stockholders of Wendell who sold their stock to taxpayer paid a capital gains tax on the excess of the selling price over the cost or other basis of their stock. (R. 23, 30.)

The Internal Revenue Service at first concluded

that the accrued interest was not taxable to Wendell since it was on the cash basis; and a refund was made to taxpayer accordingly. However, the matter was subsequently reconsidered, and after such reconsideration, the Commissioner of Internal Revenue changed his views and determined that the accrued interest was taxable to Wendell and that it should be included in the final return of Wendell for the short period (January 1, 1952, to May 10, 1952) ending with its liquidation. The Commissioner also determined that the amount of such accrued interest was $13,191.19 instead of $10,843.55. Accordingly, a deficiency notice was issued to taxpayer as transferee of Wendell's assets, and on May 29, 1956, taxpayer paid the transferee assessment of $3,957.36, plus interest of $896.22, or a total of $4,853.58. Taxpayer then filed a timely claim for refund, and after rejection of such claim taxpayer instituted this suit in the District Court. (R. 19-23, 26-30.)

The District Court upheld the Commissioner's determination and directed dismissal of taxpayer's complaint. (R. 30.) Judgment was entered in favor of the United States accordingly (R. 31-32), and taxpayer has appealed to this Court (R. 32-33).

SUMMARY OF ARGUMENT

The District Court correctly upheld the determination of the Commissioner of Internal Revenue that interest earned on notes receivable should be accrued to the date of liquidation of the Wendal National Bank and included in its final income tax return for the short period ending with its liquidation, notwithstanding the fact that it reported its income on the cash basis. That is so because Wendell's earnings

belonged to it and liability to tax thereon could not be discharged by the simple expedient of liquidation and distribution of the right to such income. This income was in fact realized by the transferor (Wendell) and should therefore be attributed to it without any special inquiry as to whether it was on the cash or accrual basis. And in the circumstances the Commissioner had the power and duty under Sections 22(a), 41 and 45 of the 1939 Code to tax this income to Wendell without regard to whether it was on the cash or accrual basis of accounting. Although the cash basis may have sufficed to clearly reflect Wendell's income during prior years, the situation was changed on account of its liquidation. This change prevented Wendell's accounting technique from clearly reflecting its income for the short period ending with its liquidation and justified the Commissioner in exercising his discretionary powers to protect the revenue. The decision of the District Court to that effect is in accord with the law, the Regulations and the court decisions, and it should accordingly be upheld by this Court.

ARGUMENT

THE DISTRICT COURT CORRECTLY UPHELD THE COMMISSIONER'S DETERMINATION THAT THE ACCRUED INTEREST IS TAXABLE TO WENDELL

We submit that this case was correctly decided by the District Court and its decision is supported by *United States* v. *Lynch*, 192 F. 2d 718 (C. A. 9th), certiorari denied, 343 U.S. 934. In that case it appeared that the corporation whose taxes were involved had followed the custom of reporting, for in-

come tax purposes, the expenses of warehousing activities on the accrual basis. However, storage income was not reported until the goods were withdrawn from storage and bills had been rendered and paid. Such a system had resulted in approximate matching of corporate expenses and revenues for the reason that in the ordinary course of business goods were stored for short terms and usually removed by June 30, the end of the corporation's taxable year. The last corporate tax return for the period ending with the liquidation of the corporation reported no storage income for goods which had not then been removed. The Commissioner held that in order to clearly reflect the taxpayer's income for its final tax period, the storage charges should be accrued to the date of liquidation and reported as income although this represented a departure from the method that the corporation had consistently used in the past. This Court held that the Commissioner acted within the limits of the discretion conferred upon him by Section 41 of the Internal Revenue Code of 1939 (Appendix A, *infra*) and that acceptance of the corporation's accounting method in prior years did not prevent the Commissioner from later exercising his statutory power within those limits. And in so holding, this Court said (192 F. 2d at p. 721):

> We think the Commissioner acted within the limits of the discretion conferred upon him by 26 U.S.C.A. §41, "* * * if the [taxpayer's accounting] method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." Acceptance of the corporation's account-

ing method in prior years did not prevent the Commissioner from later exercising his statutory power within proper limits. The fundamental change in the corporation's circumstances, that is, its liquidation and consequent non-existence, prevented its accounting technique from achieving the rough matching of expenses and income previously attained.

We understand appellant to contend that the income in question is not that of the corporation. The answer is, that the corporation has performed the services which create the right to the income which brings into play the basic rule that income shall be taxed to him who earns it. *Helvering* v. *Eubank*, 1940, 311 U.S. 122, 61 S.Ct. 149, 85 L.Ed. 81. A corporate liquidation and transfer of assets cannot divert taxability of income already earned any more than does an assignment of such income. Cf. *Helvering* v. *Horst*, 1940, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75; *Helvering* v. *Eubank*, *supra*. Appellant further argues that granting there was corporate income it should not be taxed to the corporation because of the peculiar circumstances of this case. However, "a taxpayer * * * canot avoid taxes by the simple expedient of not completing its contracts; and where a corporation puts itself in such a position that it could never complete its contracts, it is in no position to insist that even if it had income it has no tax liability". Cf. *Jud Plumbing & Heating Inc.* v. *C. I. R.*, 5 Cir., 1946, 153 F. 2d 681, 685. In the cited case a corporation, reporting on the completed contract method, was in effect placed on the accru-

> al method for the tax period terminating with the corporate liquidation in order to more clearly reflect its income for the final period of its existence. Similarly, a corporate taxpayer on the cash method has been required to accrue certain income items in it final return in order to properly reflect income. *Carter* v. *C. I. R.*, 9 T. C. 364, 1947. Here, the Commissioner seeks to impose no such drastic revision of accounting method on the corporation for, as has been noted, the corporation accrued expense items incident to the operation of its business. Consistency in the reporting of all items of income and expense is all that is asked of the taxpayer in this case.

In the instant case, the situation is not materially different from the one in the *Lynch* case, for here as there the liquidation and consequent non-existence of the corporation prevented its accounting technique from clearly reflecting its income for the short period ending with its liquidation; and here as there the Commissioner was justified in exercising the supervisory power conferred upon him by Section 41 of the 1939 Code (Appendix A, *infra*).

The decision of the District Court in the instant case is not only in line with *Lynch* but with other authorities as well, some of them being as follows: *Jud Plumbing & Heating* v. *Commissioner*, 153 F. 2d 681 (C. A. 5th); *Dillard-Waltermire* v. *Campbell*, 255 F. 2d 433 (C. A. 5th); *Standard Paving Co.* v. *Commissioner*, 190 F. 2d 330 (C. A. 10th), certiorari denied, 342 U.S. 860; *Carter* v. *Commissioner*, 9 T. C. 364, affirmed on another issue, 170 F. 2d 911 (C. A. 2d); *Floyd* v. *Scofield*, 193 F. 2d 594 (C. A. 5th); Rev. Rul. 255, 1953-2 Cum. Bull. 10.

The fundamental principle underlying all of these authorities is that the corporation's earnings belong to it and liability to tax thereon cannot be discharged by the simple expedient of liquidation and distribution of the right to such income. See *United States* v. *Lynch, supra,* 192 F. 2d at p. 721; *Carter v. Commissioner, supra,* 9 T. C. at pp. 373-374. Cf. *Lucas* v. *Earl,* 281 U.S. 111; *Helvering v. Horst,* 311 U.S. 112; *Helvering* v. *Eubank,* 311 U.S. 122; *Commissioner* v. *Lake,* 356 U.S. 260.

It is elementary that in enacting the gross income statute (Section 22 (a) of the Internal Revenue Code of 1939, *Appendix A. infra*), Congress undertook to exert the full measure of its taxing power (*Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 429); and in order to assist the Commissioner in carrying out the Congressional intent he was given broad discretionary powers with respect to the use of accounting methods and systems so as to clearly reflect the taxable income and thereby protect the revenue. Sections 41, 42 and 45 of the Internal Revenue Code of 1939 (Appendix A, *infra*); cf. *Lucas* v. *American Code Co.,* 280 U.S. 445, 449; *Brown* v. *Helvering,* 291 U.S. 193, 204-205; *Automobile Club* v. *Commissioner,* 353 U.S. 180, 189. It should also be noted that income may be realized in a variety of ways, other than by direct payment to the taxpayer, and, in such situations, the income may be attributed to him when it is in fact realized, without any special inquiry as to whether he is on the cash or accrual basis. *Brown* v. *Commissioner,* 22 T. C. 147, 151, affirmed, 220 F. 2d 12 (C. A. 7th).

It is true that Section 39.22(a)-20 of Treasury Regulations 118 (Appendix A, *infra*) does provide

that no gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation; but while that provision operates to preclude taxing a corporation on capital gains resulting from sale of the distributed assets by the shareholders (*United States* v. *Cumberland Pub. Serv. Co.*, 338 U.S. 451), still, it does not apply in respect to income earned by the corporation up to the time of liquidation even though such income has not been received by the corporation. See Rev. Rul. 255, *supra*.

Moreover, the instant transaction amounted in essence to a purchase by taxpayer of Wendell's assets for their fair value and we do not understand this to be disputed. Here taxpayer purchased the entire capital stock of Wendell for the sole purpose of acquiring Wendell's assets; the amount paid for the stock was determined by the value of such assets; and the liquidation and transfer of the assets to taxpayer was consumated on the same day the stock was purchased. (R. 17-18, 24-25.) In the circumstances, the entire transaction, considered as a whole as of course it should be, amounted in substance to a purchase of property with the cost of the stock allocable to the property. *Kimbell-Diamond Milling Co.* v. *Commissioner*, 14 T. C. 74, affirmed, 187 F. 2d 718 (C. A. 5th); *Commissioner* v. *Ashland Oil & R. Co.*, 99 F. 2d 588 (C. A. 6th), certiorari denied, 306 U.S. 661; *Estate of Suter* v. *Commissioner*, 29 T. C. 244, 258-259.

And if we look at the instant situation as a purchase of property including accrued interest on notes receivable then it seems clear that Wendell realized income in the amount of the interest accrued to the

date of liquidation (*Fisher* v. *Commissioner*, 209 F. 2d 513 (C. A. 6th), certiorari denied, 347 U.S. 1014; *United States* v. *Snow*, 223 F. 2d 103 (C. A. 9th), certiorari denied, 350 U.S. 831; *Hort* v. *Commissioner*, 313 U.S. 28; *Commissioner* v. *Lake*, *supra*) since it was in effect collected as part of the purchase price. As the Court said in *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609, 313: "A given result at the end of a straight path is not made a different result because reached by following a devious path."

In the circumstances, we submit that the District Court in the instant case rightly concluded that the accrued interest in controversy is taxable to Wendell as determined by the Commissioner.

The taxpayer says (Br. 9-11) that the Wendell bank had for many years consistently used the cash basis of accounting and that a taxpayer reporting on a cash basis must be consistent and cannot accrue either receipts or disbursements. We do not dispute this as a general proposition nor do we have any quarrel with cases as *Osterloh* v. *Lucas*, 37 F. 2d 277 (C. A. 9th) and *Martinus & Sons* v. *Commissioner*, 116 F. 2d 732 (C. A. 9th), cited by taxpayer. Indeed, we note that Judge Healy of this Court, who acted as a District Judge in the instant case, wrote the opinion of the Court in the *Martinus* case.

The taxpayer says (Br. 11) that the instant notes had not matured, and the interest on them was not due nor payable at the time of the liquidation. That may be so, but it makes no difference here and it does not show that the interest had not accrued in the accounting sense and for tax purposes as well, since interest, like rent, can be said to accrue from day to day, or ratably over an elapsed period of time. 2 Mer-

tens, Law of Federal Income Taxation (1955 ed.), Section 12.95; *Miller & Vidor Lumber Co.* v. *Commissioner*, 39 F. 2d 890 (C. A. 5th), certiorari denied, 282 U.S. 864. It is the right to receive which is important to determine accruals and when the right to receive an amount becomes fixed, the right accrues even though the amount has not yet become due or payable. *Spring City Co.* v. *Commissioner*, 292 U.S. 182; *United States* v. *Anderson*, 269 U.S. 422; *Daley* v. *United States*, 243 F. 2d 466 (C. A. 9th), certiorari denied, 355 U.S. 832. Indeed we do not understand that there is any dispute as to these principles in the instant case, and it was stipulated and found (R. 23, 29) that the interest in question had accrued at the time of the liquidation. The only question here presented is whether the Commissioner had authority to add this accrued interest to Wendell's income for the short period ending with its liquidation, and we submit that he did for the reasons given in this brief.

The taxpayer says (Br. 12) that Wendell had expenses attributable to this accrued interest, and such expenses were not accrued by the Commissioner to the time of liquidation. However, the stipulation and finding show (R. 19, 26) that expenses attributable to this accrued interest had been deducted for income tax purposes when paid by Wendell prior to its liquidation; also that unpaid accrued expenses of Wendell had not been deducted for income tax purposes at the date of liquidation. We may conclude from this that expenses attributable to the accrued interest had been deducted currently prior to the liquidation. But if any of these expenses had not been so deducted, then taxpayer, which had the burden of

proof (*Helvering* v. *Taylor*, 293 U.S. 507, 514), should have established their nature and amount in the District Court so they could be given consideration. Apparently, taxpayer did not undertake to do this, and in the circumstances, we submit that there is no adequate basis for taxpayer's contention here.

Taxpayer cites (Br. 13) *United States* v. *Horschel*, 205 F. 2d 646 (C. A. 9th); *Commissioner* v. *Henry Hess Co.*, 210 F. 2d 553 (C. A. 9th); *Herbert* v. *Riddell*, 103 F. Supp. 369 (S.D. Cal.); and *Telephone Directory Advertising Co.* v. *United States*, 142 F. Supp. 884 (C. Cls.). But all of those cases are distinguishable from the instant one on the facts, and none of them sustains the contention of the taxpayer here. Here we have a situation closely resembling the ones in cases such as *Lynch* and *Jud Plumbing* which we submit were correctly decided and should be followed here. In this connection it will be noted that in the *Telephone Directory* case, *supra*, the Court of Claims referred to and cited with approval not only the decisions of this Court in the *Horschel* and *Hess* cases (see 142 F. Supp. at p. 889), but also the decision of the Fifth Circuit in the *Jud Plumbing* case, saying with regard to the latter (142 F. Supp. at pp. 889-890):

> The defendant's reliance on the completed contract cases, represented by *Jud Plumbing & Heating, Inc.*, v. *Commissioner*, 5 Cir., 153 F. 2d 681, and *Standard Paving Co.* v. *Commissioner*, 10 Cir., 190 F. 2d 330, certiorari denied, 342 U.S. 860, 72 S.Ct. 87, 96 L.Ed. 647, is misplaced. In those cases the Commissioner properly accrued the income to the corporations that were using the completed contract method, which al-

lows the postponement of accrued income, because it more accurately reflected income. In those cases the accrual was made only to the date of liquidation. In all those cases the right to receive the income was fixed and definite and in some instances the income had already been received.

In the instant case, the accrual was made only to the date of liquidation and the right to receive the income was fixed and definite. In the circumstances, the action taken by the Commissioner was well within the bounds of his statutory authority to require computations which clearly reflect income; and as we have pointed out above, the decision of the District Court to that effect is amply supported by authorities such as the *Lynch* decision of this Court and the *Jud Plumbing* case in the Fifth Circuit. [3] The taxpayer's objections and criticisms are without merit, and they should be rejected here as they were by Judge Healy in the District Court.

It remains to add a few words as to the brief of the *amici curiae* who have joined the appellant in urging this Court to reverse the decision of the lower court herein. The *amici curiae* state (Br. 3) that the final income tax return of the Wendell Bank, for the period ending May 10, 1952, was filed on the accrual basis. We do not understand that to be so, and we would point to the return itself (Stip. Ex. C)

3/ Cases such as PATCHEN v. COMMISSIONER, decided July 23, 1958 (C. A. 5th); and GOODRICH v. COMMISSIONER, 243 F. 2d 686 (C. A. 8th) are not in point and do not aid the instant taxpayer irrespective of whether they may be considered correct. Those cases deal with changes in accounting methods of going concerns, while here we are concerned with a liquidated corporation which by its act of liquidating and going out of existence prevented its accounting technique from clearly reflecting its income for the short period ending with its liquidation. See UNITED STATES v. LYNCH, SUPRA.

which on page 3 gives as an answer to question 9 that the return was prepared on the cash basis. In fact, nobody has contended otherwise, so far as we know, and the fundamental question here presented is whether in the circumstances the Commissioner had authority to require inclusion of accrued interest on notes receivable to the date of Wendell's liquidation even though generally speaking the return was made on the cash basis.

The *amici curiae* contend (Br. 4-7) that the Commissioner can not do this even if necessary to clearly reflect income, and that if the Commissioner wants to make a change he must put Wendell's income and deductions upon an accrual basis for the entire period and not merely add the accrued interest to an otherwise cash basis return as that would result in a hybrid method which is not countenanced by the law.

It may be that hybrid methods are not generally favored, and the general rule is against accounting for and reporting income partly on the cash and partly on the accrual basis. *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269; *Security Mills Co.* v. *Commissioner*, 321 U.S. 281. However, it is equally clear that hybrid methods are both acceptable and necessary in some instances where they clearly reflect income (*Schram* v. *United States*, 118 F. 2d 541 (C. A. 6th); *SoRelle* v. *Commissioner*, 22 T. C. 459, 468-469; 2 Mertens, Law of Federal Income Taxation (1955 ed.), Section 12.05a; cf. *Kahuku Plantation Co.* v. *Commissioner*, 132 F. 2d 671 (C. A. 9th); and, indeed, such methods are explicitly recognized to some extent under Section 446(c) of the the 1954 Code do not represent any radical change

here, because here we are dealing with the taxable period ending May 10, 1952, which is governed by the 1939 Code as stated above. However, it would seem appropriate to add that the new provisions of the 1954 Code do not represent any radical change in the law since hybrid methods of accounting although not generally appropriate have long been sanctioned under the 1939 Code and prior law where necessary to clearly reflect income, as we have indicated above.

Moreover, the cases upon which we chiefly rely, such as *United States* v. *Lynch, supra,* and *Jud Plumbing & Heating* v. *Commissioner, supra,* strongly support the view that hybrid methods may be resorted to where necessary to clearly reflect income and protect the revenue in situations like the one at bar.

Waldheim Realty & Inv. Co. v. *Commissioner,* 245 F. 2d 823 (C. A. 8th), cited in the *amici* brief (Br. 5), is distinguishable on the facts and represents quite a different taxable situation, irrespective of whether it may be considered as correctly decided.

The *amici curiae* reiterate their contention (Br. 7-8) that it is beyond the power of the Commissioner to require Wendell to include the accrued interest in its final return; and they argue that such inclusion produces a distortion of income, apparently basing their argument mainly upon the untenable proposition that no deviation can ever be made from a strict cash or a strict accrual method (whichever is applicable) and that if there be any such deviation, however slight, then *a fortiori* there must be an ensuing distortion of income to that extent.

This argument of the *amici curiae* is not only at

variance with the established law and practice, but it really assumes the question and does not meet the basic issue as to whether the Commissioner can require a cash basis taxpayer to report accrued income in its final return where such income was earned by it prior to its liquidation and dissolution. Moreover, if not so taxed in the instant case, the income might escape taxation altogether since the distributee in liquidation (taxpayer herein) concededly offset its costs against the amount of interest that it eventually received. (R. 23, 29-30.)

In the circumstances of this case, the accrued income was actually realized by Wendell prior to liquidation, as we have pointed out above, and in such circumstances it make no difference whether Wendell was on the cash or accrual method of accounting. Cf. *Brown* v. *Commissioner*, *supra*. In either case, Wendell constructively received the amount of this accrued interest as a part of the purchase price for the transferred assets. *Kimbell-Diamond Milling Co.* v. *Commissioner*, *supra; Commissioner* v. *Ashland Oil & R. Co.*, *supra; Estate of Suter* v. *Commissioner*, *supra*.

And even if there had been no purchase of stock with intention to liquidate and immediately acquire the assets, still, the result would be the same for as pointed out by this Court in the *Lynch* case, *supra*, the fundamental change in the corporation's circumstances, that is, its liquidation and consequent nonexistence, prevented its accounting technique from clearly reflecting its income for the short period ending with its liquidation; and a corporate liquidation and transfer of assets cannot divert taxability of income already earned any more than does an assign-

ment of such income.

The *amici curiae* refer (Br. 8-9) to Treasury Regulations 111, Section 29.52-1 (which is substantially the same as Treasury Regulations 118, Section 39.52-1, Appendix A, *infra*, here applicable). This regulation provides that a corporation is not in existence after it ceases business and dissolves, retaining no assets. See *United States* v. *Loo*, 248 F. 2d 765 (C. A. 9th), certiorari denied, 356 U.S. 928. However, that provision is clearly not at variance with our views and it does not support the extreme contentions of the taxpayer here. It is true that in the *Hess* case, *supra*, this Court reaffirmed its earlier decision in the *Horschel* case, *supra*, and said (210 F. 2d at p. 558) that where shareholders of a fully dissolved corporation receive money or other property which would have been taxable income to the corporation at that time, if the corporation were still in existence, the corporation is not taxable thereon. But in that connection, this Court did not hold nor purport to hold that the Commissioner could not make an allocation of income in a situation like the one at bar so that the amount accrued to date of liquidation will be taxed to the liquidating corporation in its final return regardless of whether it happens to be on the cash or accrual basis. Such an allocation and treatment of interest is supported by and consistent with decisions such as *United States* v. *Lynch*, *supra*; *Jud Plumbing & Heating* v. *Commissioner*, *supra*; *United States* v. *Horschel*, *supra*; *Commissioner* v. *Henry Hess Co.*, *supra*, none of which is discussed or even cited in the brief of the *amici curiae*. And see 2 Mertens, Law of Federal Income Taxation (1955 ed.) Section 17.17.

The *amici curiae* say (Br. 11) that it is apparent that under any handling of the situation, the entire amount of interest will be reported as a part of the gross income of some taxpayer. But the *amici curiae* do not mention nor discuss the stipulated fact (R. 23, 29-30) that the transferee in the instant case (Idaho First National Bank), although reporting as income the interest when collected, nevertheless offset the collections against the allocated cost, so that all of the amount collected was recovery of cost and not subject to income tax. The method prescribed by the Commissioner would prevent an incongruous result and would achieve the desirable result of taxing the accrued interest to the one (Wendell) who earned it.

As we have indicated above, the *amici curiae* brief makes no effort to reconcile or explain the cases such as *Lynch* and *Jud Plumbing* which are most analogous to the situation at bar, but rather chooses to ignore them. And in the circumstances we can only conclude that the *amici curiae* are asking this Court to depart from the principles for which such cases stand. We submit that there is no adequate basis in the law, the Regulations or the applicable court decisions for any such deviation, and therefore the determination of the District Court herein should be upheld by this Court.

CONCLUSION

The jugment of the court below should be affirmed.

Respectfully submitted,

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October, 1958

APPENDIX A

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal servise, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 22)

SEC 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SECTION 42. (As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687) PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a difference period. * * *

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 42.)

SEC. 45. (As amended by Sec. 128 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21) ALLOCATION OF INCOME AND DEDUCTIONS.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

(26 U.S.C. 1952 ed., Sec. 45.)

SEC. 47. RETURNS FOR A PERIOD OF LESS

THAN TWELVE MONTHS.

* * * * * * *

(g) [As added by Sec. 135 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Returns Where Taxpayer Not In Existence For Twelve Months.*—In the case of a taxpayer not in existence during the whole of an annual accounting period ending on the last day of a month, or, if the taxpayer has no such annual accounting period or does not keep books, during the whole of a calendar year, the return shall be made for the fractional part of the year during which the taxpayer was in existence.

(26 U.S.C. 1952 ed., Sec. 47.)

SEC. 48. DEFINITIONS.

When used in this chapter—

(a) [As amended by Sec. 135 (d) of the Revenue Act of 1942, *supra*] *Taxable Year.*—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.

* * * * * * *

(c) *"Paid Or Incurred," "Paid Or Accrued."*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

(26 U.S.C. 1952. ed., Sec. 48.)

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation, subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. * * *

(26 U.S.C. 1952 ed., Sec. 52.)

* * * * * * *

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.22 (a)-20. *Gross income of corporation in liquidation.* When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298). Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however, they may have appreciated or depreciated in value since their acquisition. * * *

Sec. 39.41-1. *Computation of net income.* Net

income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 39.42-1 to 39.42-3, inclusive). If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 39.41-2. *Bases of computation and changes in accounting methods.* (a) Approved standard method of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definition of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by

the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 39.42.2 and 39.42-3.) On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. * * *

* * * * * * *

Sec. 39.41-3 *Methods of accounting.* It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * *

* * * * * * *

Sec. 39.52-1. *Corporation returns.* * * *

(b) A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part

of a year during which it was in existence. A corporation is not in existence after is ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets, and it continues in existence. * * *

* * * * * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

THE IDAHO FIRST NATIONAL BANK,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

CIVIL NO. 3269

MEMORANDUM OF DECISION

The facts in this suit for refund are stipulated, so that the sole question for decision is one of law.

It is my opinion that the position taken by the Commissioner is warranted by statute and has ample support in the decisions.

Let judgment in favor of the United States be entered accordingly.

WILLIAM HEALY
Acting District Judge

Dated October 4, 1957.

No. 16,004

United States Court of Appeals

For the Ninth Circuit

THE IDAHO FIRST NATIONAL BANK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

REPLY BRIEF OF APPELLANT.

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BERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 16,004

United States Court of Appeals

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THE IDAHO FIRST NATIONAL BANK,
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Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

REPLY BRIEF OF APPELLANT.

SUMMARY OF ARGUMENT.

The interest was not realized by Wendell bank.

Such interest did not escape taxation.

The liquidation of Wendell bank, being the event on which commissioner relies, does not justify the commissioner in accruing the interest income to Wendell bank.

The change sought to be made by the commissioner is not a change of method.

ARGUMENT.

THE INTEREST WAS NOT REALIZED BY WENDELL BANK.

Interest accrues by the passage of time. It is earned by a cash basis taxpayer when it is received. In this case Wendell bank did not receive the interest. It did not receive anything for the interest. There was no economic benefit to Wendell bank by the accrual of the interest.

In this case the economic benefit accrued to the former shareholders of Wendell bank in the enhanced value of their stock. Such enhanced value was reflected in the sale price of the stock to the appellant.

SUCH INTEREST INCOME DID NOT ESCAPE TAXATION.

The interest value was taken into consideration in the sale price of the stock of the Wendell shareholders to the appellant. It was reflected in the sale price of the stock and resulted in a capital gains tax to the shareholders.

The interest income was received by the appellant bank as transferee on liquidation. It was income to appellant bank and was reportable, and reported, as income by such transferee.

LIQUIDATION OF WENDELL BANK, BEING THE EVENT ON WHICH THE COMMISSIONER RELIES, DOES NOT JUSTIFY THE COMMISSIONER IN ACCRUING THE INTEREST INCOME TO WENDELL BANK.

Interest income of Wendell bank was a recurring substantial classification of income consistently han-

dled in the accounting system of the bank for many years on a cash receipts and disbursements basis. The interest income sought to be accrued by the commissioner is clearly not income under that method of accounting.

There is no method of accounting which is exact at all times nor absolute in the determination of income. The best that can be obtained from any method of accounting is consistency together with the application of recognized accounting principles.

There should be general rules with respect to methods of accounting recognized by the federal income tax law upon which both the government and the taxpayer may rely, not subject to change at any time it may appear to the commissioner that a change will result in more tax for the government. The rules should not be changed to fit any particular instance. The change sought to be made by the commissioner in this case violates recognized accounting principles.

The acts of the commissioner ignore the principle of consistency and rely upon liquidation as the event which gives rise to the right to make the change. There is no authority in the statute to the commissioner to make a change solely because of liquidation.

The entire argument of the appellee amounts to an urging to the court to approve such broad powers in the commissioner as would authorize the commissioner upon liquidation to make any change in items which would result in the most tax for the government. Appellee's construction of the statute is not that the

commissioner should be given the authority to make changes in accounting methods as would clearly reflect income, but, rather, make changes in items of income or expense, in the books of the corporation, to clearly reflect the greatest possible income.

THE CHANGE SOUGHT TO BE MADE BY THE COMMISSIONER IS NOT A CHANGE OF METHOD.

Here the commissioner seeks to accrue only interest income of a cash basis taxpayer. Such change is being made in a period which also includes income earned in former periods and received in the period disturbed by the commissioner. This results in a distortion of income in the period in which the change has been made. It results in bunching income into such period. The commissioner disregarded items of expense incurred but not paid and not deducted.

The appellee relies chiefly on three cases, namely, *United States v. Lynch,* 192 Fed. 2d 718; *Jud Plumbing and Heating Company v. Commissioner,* 153 Fed. 2d 681, and *Standard Paving Company v. Commissioner,* 190 Fed. 2d 330.

We fail to see any application of the *Lynch* case to the facts here. In the *Lynch* case, the corporation transferred apples as a dividend to its shareholders. There the court held the apples to be a dividend and as such earnings of the corporation and income to the shareholders.

The *Jud* and *Standard Paving* cases appear to us to be identical with each other in principle. It also

appears to us that in each such case there was the distinct flavor of liquidation to escape taxation.

The case before the court does not have that flavor.

Dated, Boise, Idaho,
October 27, 1958.

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